LAW AND CONTEMPORARY PROBLEMS

WAR CLAIMS

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WAR CLAIMS

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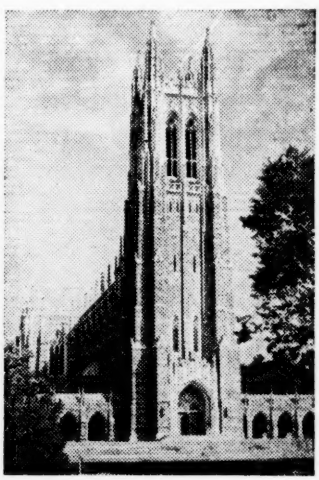

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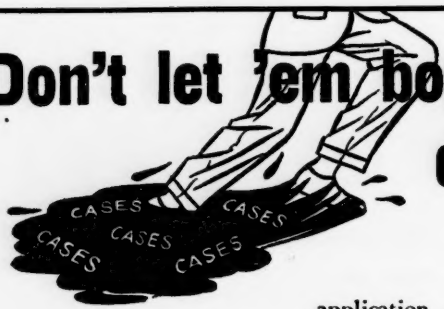

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LAW AND CONTEMPORARY PROBLEMS

VOLUME 16 SUMMER, 1951 NUMBER 3

FOREWORD

The importance of war claims increases after each major conflict; the claims from World War I were greater than those for any previous war, and those of World War II, discussed in this symposium, far overshadowed prior ones in both size and complexity. Such a development is not surprising, considering the nature of contemporary warfare. The global geography of the last war, its total nature as reflected in deliberate mass indiscriminate bombing on an ever increasing scale of civilians and their properties, the refinement of techniques of economic warfare, have all resulted in a tremendous growth in the number and magnitude of claims for damages to persons and properties. At the same time, a growing awareness of international law, of its doctrines and potentialities, even if not always accompanied by acknowledgment of its principles and judgments, has facilitated and favored the filing of war claims. Beyond these factors, others have fostered the rise of further claims on a vast scale. The genocide policies of the Fascist states, accompanied as they were with systematic confiscations and forced transfers of all properties of the eliminated races, lead to staggering claims if the victors choose to attempt restitution here in some form. Similar questions must be faced in attempts to undo the various, often subtle, forms of organized Nazi looting of the economies of occupied countries. Finally, the postwar nationalization and socialization programs of governments in much of Europe have a vital relationship to war claims in these countries.

The unfortunate fact is that the appalling complexity, scope, and amount of these World War II claims may serve to defeat them, regardless of their admitted merits and justice. Sums so staggering obviously cannot be collected from the conquered or paid by the victors. Even if collection were possible, the problems of determining with any degree of accuracy the amounts of the damages and losses to person and property, of tracing and recovering assets from the hands of innocent purchasers, of ascertaining the rightful heirs of those who have disappeared without trace, may well appear so overwhelming as to paralyze further action. Certainly it is to the credit of the Allies that they have not been completely baffled by such numerous and novel issues, but have attempted to work out solutions which even if far from perfect have pioneered and accomplished much.

I cannot but wonder if the entire concept of war claims and reparations may not

be inadequate to cope with the results of present-day conflicts among nations. Restoration or compensation on an actual damage basis for personal or property injuries or losses may no longer be feasible or even desirable. Instead, the immediate objective may be relief to the destitute, and the ultimate goal may be economic and social rehabilitation of an entire country, with the emphasis not on restoration of pre-war conditions but on long range economic and social development. Where financial resources are lacking for such ambitious programs, governments may resort to extensive confiscation and nationalization of industry, agriculture, and property, as Mr. Herman points out has been the case in much of Eastern Europe where the Marshall Plan has not operated. Where funds are available, as in the Philippines, these drastic measures can be avoided. Perhaps, as Mr. Schein and Professor Wright suggest, the United Nations in the future may take the lead not only in condemning and punishing aggression, but also in directing and accomplishing the rehabilitation and development of the economy of the victims, irrespective of race or nationality.

ROBERT KRAMER.

WAR DAMAGE COMPENSATION AND RESTITUTION IN FOREIGN COUNTRIES

NEHEMIAH ROBINSON*

I

INTRODUCTORY

This article deals with domestic legislation on war damage compensation and restitution. Therefore, all problems relating to reparations and their use for war damage compensation as well as to international restitution[1] must remain outside the scope of this study. Similarly, international agreements concerning war damage compensation and restitution[2] are excluded therefrom. Furthermore, we shall treat here of war damage compensation only in so far as it is not based on any insurance schemes for war losses in Allied and enemy countries during World War II.

"War damage compensation" is reparation of losses[3] sustained in a country at war (or in a neutral country which was subjected to such losses inadvertently by the belligerents[4]) by acts of war, enemy occupation, or their consequences. "Restitution" is the restoration of available property which was confiscated or sequestrated or was subjected to forced transfers by acts of the occupant or of the government or other authorities or of private persons in the country of the situs of the asset. In practice, "restitution" is not restricted to restoration of the object to the owner but also involves, within certain limits, compensation for losses sustained by the owner through and during deprivation of possession. The basis of the damage and the consequence of the act (in the first instance involving destruction of or damage to property or bodily harm and in the second, transfer of title) are different. None-

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[1] International restitution concerns the obligation of the defeated enemy countries to restore property which they carried off during occupation of an Allied territory and/or which was found in their territory after the end of the war.

For the regulations enacted in occupied Germany and Austria see *i.a.*, Robinson, *Reparations and Restitution in International Law*, THE JEWISH YEARBOOK OF INTERNATIONAL LAW 197ff. (1948).

Special provisions to this effect were also included in the Armistice Agreements and Peace Treaties with the satellite nations (Rumania, Bulgaria, Italy, and Hungary).

For the situation in Japan see 16 DEP'T STATE BULL. 708 (April 20, 1947) and 17 *id.* 1000 (Nov. 23, 1947).

[2] See, for instance, Art. 24(4) (war damage compensation) and Arts. 24 and 25 (restitution) of the Peace Treaty with Rumania and the corresponding articles in the other treaties.

[3] Damage to persons (life, limb, liberty) is included in this article only in so far as the basis for both kinds of loss is the same.

[4] To care for such cases Switzerland on July 3, 1942, issued a decree creating a fund to cover damage caused by violations of its neutrality and supplemented this decree by another dated Aug. 21, 1942 relating to the participation of the Federation in the expenses involved.

In Sweden a law passed in 1939 provides for state insurance against war losses. It covers mainly transport risks, including embargoes.

theless, both are interrelated in as much as war damages embrace, in many instances, losses sustained as a result of confiscation or alienation of property if it is no longer in existence, if it was damaged, or if the despoiled person suffered other losses.

II

WAR DAMAGE COMPENSATION[5]

A. Introductory

The legislation on war damage compensation in foreign countries differs from nation to nation. In broad terms, the foreign countries could, with regard to this legislation, be divided into five groups: (a) those in which a registration of such losses has been made but no action taken to assess, let alone compensate, the damage; (b) those where the principle of war damage compensation is recognized but no legislation has yet been enacted to provide for actual compensation payments; (c) those which carry on their statute books partial measures of compensation; (d) those which, in addition to insurance schemes, have certain regulations for common war damage compensation; and (e) those which have enacted and implemented comprehensive legislation to this effect.

B. The First Group: Greece, Poland

Examples of the first group are Greece and Poland.

In Greece the victims of war damages were requested immediately following the end of hostilities to submit declarations to the Ministry of Finance concerning their losses. The declarations were not based on law, they were not of an obligatory nature and served statistical purposes only, and the acceptance of registration by the General Accounting Office was not construed as a commitment that compensation would be paid.[6] Since then no law has been promulgated for the compensation of these damages; the losses are of such a nature that nobody seems even to think of their reparation.

The situation is more or less similar in Poland. In 1945, the registration of war losses was ordered on the basis of a ministerial decree; all registrations by residents of Poland had to be made on or before February 15, 1946. Registration by foreigners was also accepted after that date, while registration abroad was made in the Polish consulates in accordance with special announcements.[7] However, it was made clear at that time that the submission of registration served only statistical and legal purposes and did not imply that payment of the damages might be expected in the

[5] On the question of the rights of U. S. citizens to compensation in foreign countries and the overall problem of indemnification on the nationality or territorial basis, see Fraleigh, *Compensation for War Damage to American Property in Allied Countries*, 41 AM. J. INT'L L. 748 (1947).

For lack of space legislation in Latin America (see, for instance, the Mexican decree of Sept. 13, 1945, etc.) is not treated here.

[6] See 17 DEP'T STATE BULL. 995 (Nov. 23, 1947).

[7] In the U. S. the time elapsed on April 30, 1947, but registration was continued for some time on the basis of a request for extension.

near future.[8] The registration was made on special questionnaires, with different forms for urban and for other residents, and containing space for listing immaterial damage (loss of life, etc.), losses in movables and real estate, and other damage (for instance, expulsion, confiscation of moneys, forced labor, fines, etc.).

C. The Second Group: Czechoslovakia, Yugoslavia, Burma

In Czechoslovakia the decree of August 31, 1945,[9] provided for registration and assessment of war damages. These included losses suffered after October 17, 1938, in Bohemia, Moravia, and Silesia (the three provinces of the country) and abroad by Czechoslovak citizens, as well as by Czechoslovak legal persons domiciled in the three provinces. The losses must have resulted from injury to life, limb, or health; from violent death, imprisonment, deportation, maltreatment; from expropriation or removal abroad of property; from destruction of property; or certain other damages. They had to be the result of action by belligerents, of persecution on political, national, or racial grounds by the German or Hungarian occupants or by organs acting on their orders, or of terrorist acts by organizations or persons hostile to the Czechoslovak State. The assessment of the losses was made on the basis of actually caused damage. Serving as such a basis in case of damage to property was the replacement value of the property on the effective day of the decree or the market price on that date; all other kinds of damages were to be assessed on the basis of existing general regulations for compensation of such losses. Submission of an application or the assessment did not secure a claim to compensation.

Somewhat simpler in substance were the provisions of the detailed Yugoslav law of June 10, 1945.[10] According to this law, war damages included damages caused to the person, estate, or income of Yugloslav citizens and legal persons[11] in Yugoslavia and abroad by military action, acts of military and other authorities, and persons enumerated in the law. The losses were computed on the basis of the local currency (dinar) in accordance with prices prevalent on August 5, 1941. In cases of material damage the costs required to reestablish the old position were generally considered to represent the loss. Damages to life included non-received income and the costs required for the maintenance of dependents; losses of health, freedom, and similar non-material damage were computed on a similar basis. The declarations of damage had to be submitted in Yugoslavia within 40 days of the publication of the law; by persons residing abroad, within 40 days of the announcement by the Yugoslav diplomatic or consular representative. The assessment, on the basis of the declarations, was made by the District War Damage Commission.

In Burma claims for compensation for damage to property and certain goods

[8] See, for instance, Airgram from the U. S. Embassy in Warsaw to the State Department, June 21, 1946.

[9] Collection of Statutes and Orders, 1945, No. 54/55.

[10] Službeni List 1945, No. 4. For claims by U. S. citizens, see 21 DEP'T STATE BULL. 865a (Dec. 5, 1949).

[11] Curiously enough, damages caused to properties belonging to the state and its regional subdivisions were included.

could be filed with the War Damage Claims Commission. The purpose of the registration was only to reach decisions as to the exact liability to be assumed and it was made clear that the consideration of the claim and its assessment did not commit the Government to the payment of compensation.[12]

In Malaya and Singapore claims were registered with the War Damage Claims Commission. Legislation was reported to be under preparation to compensate for certain types of damage.[13]

D. Germany and Austria

The situation prevailing in Germany and Austria is peculiar in that the regulations issued during the war are not applied and no new general rules have so far been enacted. The basis for war damage compensation was the November 30, 1940[14] War Damage Ordinance, under which compensation for damage due to war acts, deportation, flight, etc., was to be made either in money sufficient to restore the destroyed property or in the equivalent in kind; in the same manner, the cost of repairs was to be repaid. Some implementary regulations were issued subsequently, although most of the problems involved (for instance, how the cost of reacquiring the lost object was to be computed) were never settled.

After the end of the war, the Allies prohibited in Germany payments of claims under the war damage legislation.[15] The only remedy available is that based on the Immediate Aid Ordinance of August 4, 1949,[16] whereby persons who suffered property damage as defined in the November 30, 1940 Ordinance and are in need of assistance are eligible for it. Assistance consists in annuities, payments for building purposes and acquisition of home furnishings, as well as in grants for general economic rehabilitation.

In Austria owners of damaged houses are entitled to loans for reconstruction purposes on the basis of the law governing the Fund for the Reconstruction of Houses (Wohnungsaufbaufond-Gesetz). The means of the fund are raised by a special tax on the income from the rent of undamaged houses.

E. The Third Group: Italy

Basically, war damage compensation there is regulated by Law No. 1534 dated October 26, 1940, and Royal Decree No. 1957 of December 16, 1940.[17] Subsequently a number of implementary regulations dealing with certain questions relating to the losses were issued by the competent Ministry. So far, only damage to the most

[12] 17 DEP'T STATE BULL. 1089 (Dec. 7, 1947).

[13] 20 *id.* 87 (Jan. 16, 1949).

[14] REICHSGESETZBLATT, Part I, 1547.

[15] See, for instance, Ordinance No. 99 of the British Military Government, Schedule, Prohibited Expenditures referred to in par. 2 of Art. 1. MILITARY GOVERNMENT GAZETTE, GERMANY, BRITISH ZONE OF CONTROL, No. 21, p. 589.

[16] For the law and its implementary regulations see, for instance, Kitz-Raue, *Gesetz zur Milderung dringender sozialer Notstaende (Soforthilfegesetz)* (Stuttgart and Cologne, 1949).

More comprehensive legislation is under consideration.

[17] Gazzetta Ufficiale 1940, No. 270, and *id.* 1941, No. 35. For the rights of U. S. nationals see Art. 78 of the Peace Treaty.

essential property, such as clothing, tools, and household utensils is being compensated in installments. The total value of claims submitted amounts to about 3 trillion lire, and the payments made thus far, to 80 or 100 billion lire; in many instances only one installment has been paid so far.[18] Payment of other damage awaits the enactment of a new law now in preparation. Eligible under the present regulation are Italian citizens and nationals of states which have concluded an agreement of reciprocity with Italy; no provisions exist in favor of stateless persons.

F. The Fourth Category: Norway, Denmark

In Norway war damage compensation in the strict sense of the word (*i.e.*, other than insurance) is paid on the basis of the law of July 10, 1946 on damages to buildings, and two laws dated April 25, 1947, *viz.*, Law No. 3 on war damage compensation for loss of movable property, and Law No. 4 on certain losses caused during the war of 1940-45.[19] Loss of movables is compensable in regions totally devastated by the Germans and provided the lost property will be replaced. If no claim under the insurance laws is possible, compensation is paid out of funds, allocated by the Parliament, by the Compensation Office of the Ministry of Justice. Included in exceptional cases are losses which are or should have been covered by insurance. Payment is not obligatory, *i.e.*, the Office may grant compensation if the loss is considerable, the claimant is in need, and he behaved patriotically during the war. The ceiling is 10,000 kroner. Special consideration is to be given to the rebuilding of enterprises. Substantial losses caused by acts of patriotism and by arrest are compensable. Heirs receive compensation in exceptional cases only.

As a rule, only Norwegian citizens residing in Norway are eligible. Excluded are owners of property whose conduct during the war was not satisfactory (German collaborators, for instance). Stateless persons who have lived in Norway for at least 20 years are in practice placed in the same category as Norwegians.

Denmark provides more comprehensive non-insurance compensation for losses sustained during German occupation. The basis for compensation is Law No. 475 of October 1, 1945.[20] The law covers loss of life, imprisonment, deportation, damage incurred through participation in the liberation movement (opposition to the German occupant), damage to property, loss of profession, interruption of study, and the like. Compensation is restricted to Danish citizens and to German citizens who were Danish citizens before 1933.

G. The Fifth Group: France, Belgium, Luxembourg, Holland

France[21] is the traditional country of comprehensive war damage compensation.[22]

[18] These data are based on information received in June, 1950, from the Sottosegretariato per i Danni di Guerra.

[19] Norsk Lovtidend, No. 15, 1947.

[20] Lov om Erstatning til Besaettelsestidens Ofre.

[21] Prior to the law described below, a number of decrees were issued to provide for partial compensation.

[22] For Algeria, see decree No. 47-1467 of Aug. 9, 1947 extending the validity of Law No. 46.2389 to that region. The same law was made applicable in Tunisia by virtue of the Tunisian decree of July 17, 1947. Concerning Morocco, see 19 DEP'T STATE BULL. 211 (Aug. 15, 1948).

The laws of April 17, 1919, and of June, 1919, issued after the First World War, recognized the right of damagees to full indemnification of their material and personal losses suffered in consequence of the war. This rule was followed *in principle* during and after the last war. The laws of 1940 and 1941 provided for the participation of the state in the costs of reconstructing destroyed houses. Law No. 46.2389 of October 28, 1946[23] on war damages regulated anew the right to indemnification of material damages, while the earlier law of May 20, 1946, simply put again into operation the provisions of the law of June 24, 1919, concerning civilian victims of the war. Law No. 46.2389 was supplemented with a number of implementary laws, decrees, regulations, and circulars.[24]

The purpose of the law of October 28, 1946, is not so much indemnification of the damagee[25] as reconstruction of the country. Thus compensation is granted only on the basis of an obligation by the damagee to rebuild the destroyed property. He has to accomplish this task not according to his own wishes but in accordance with the requirements of existing economic plans and urban legislation. The next feature of the law is based on the financial impossibility to repay all losses at once. Therefore, although the principle of "integral" reparation is recognized, actual payment is made on the basis of priorities; ceilings for immediate compensation are established and certain property is excluded. An order of priorities has been fixed on the basis of a long-range program.[26] The ceilings for immediate payments depend on the nature of the property and its ownership: in the case of movables of current use, the ceiling is 200,000 francs; in the case of real estate, it is 5,000,000 francs. Amounts above this ceiling may be paid up to 70 per cent pending the elaboration of a final scheme of compensation. No compensation is paid for luxury articles, movables not of current or family use, monetary losses, and losses not exceeding 3,000 francs.

Under the law material and direct losses caused by events of war are compensable. These include, in addition to military action and sabotage, a number of other acts, such as occupation by the enemy resulting in destruction or deterioration of property; requisitions; damage to boats, etc. Certain damages are presumed to be the result of war events, for instance, losses caused to persons expelled by the enemy, pillage during the war, and so on.

Eligible to compensation under the law are French citizens and their successors

[23] Journal Officiel, Oct. 29, 1946.

[24] For a full list of these enactments up to 1947 see ALAIN LE TARNEC, LES RÈGLES NOUVELLES DE RÉPARATION DE DOMMAGES DE GUERRE 219-221, 229 (Paris 1947). Subsequent enactments include the law of Dec. 31, 1948, concerning maximum amounts.

[25] The material damages were of such magnitude that indemnification pure and simple could not be achieved within the existing budgetary limitations: 310,000 houses were completely destroyed and 926,000 partially; 53,000 agricultural enterprises completely demolished and 160,000 partially. The number of industrial and commercial enterprises totally and partially destroyed was ten times larger than during the First World War. The total amount of the damage was 4,500 billion francs.

[26] See, for instance, the temporary rules laid down in Art. 7 of Finance Law No. 46.2921 of Dec. 23, 1946. At present these priorities are established for each department (province).

in right, French legal persons, nationals of the French Union, foreigners who themselves served or whose ascendants or descendants served in the armed forces of France or its Allies during the First or Second World Wars, and Frenchmen who acquired real estate from a foreigner. Other persons are eligible to receive compensation if the right is based on international agreements.[27] Loans are granted for purposes of urgent reconstruction, or when this is useful to the French economy, to persons not otherwise coming under the law. Those excluded from the benefits of the law are, within certain limitations, collaborators and some other condemned persons. A requisite condition for compensation is that the damage occurred in France or in a French overseas possession. Compensation for losses suffered by French physical and legal persons abroad not indemnifiable on the basis of reciprocal agreements was left for subsequent legislation.

The total amount paid out for purposes of war damage compensation in the years 1945-1949 is estimated at about 510 billion francs, of which 280 billion were paid in 1949.

Belgian legislation on war damage compensation consists of two general measures, *viz.*, the law of October 1, 1947, relating to damages to private property, and the law of July 6, 1948, concerning property required for public services. In addition, there are a number of laws and decrees dealing with special damages, such as military servitude, and requisitions. In execution of the law of October 1, 1947, a considerable number of laws and decrees were promulgated.[28]

The basic law of October 1, 1947, refers to direct and material damages caused by war events on Belgian territory to movable property and real estate and to boats outside of Belgium. Small losses are excluded. War events include acts done in connection with the war and occupation (except military requisitions), crimes against private property, forced evacuation, and unknown causes which resulted in the destruction of merchandise, etc., between May 10 and 31, 1941, and between April 8, 1944, and February 15, 1945. Only physical and legal persons who were of Belgian nationality on the day of damage and on the effective date of the law are eligible, except in so far as international agreements provide otherwise.[29] By decree certain categories of stateless persons and foreigners may be granted the same treatment as Belgians on the basis of their activity against the enemy. On the other hand, the law excludes a number of persons, such as those condemned for crimes against the security of the state, those who participated in spoliation, etc.

[27] For instance, stateless persons assimilated in their civil rights to citizens; U. S. nationals on the basis of the U. S.-French agreement on commercial policy and related matters dated May 28, 1946 (see 16 DEP'T STATE BULL. 166 (Jan. 26, 1947)).

[28] For all this legislation see, *i.a.*, Vranck, *La Réparation des Dommages de Guerre aux Biens*, LA CHARTE (1949).

For prior legislation concerning material and immaterial losses see NEHEMIAH ROBINSON, INDEMNIFICATION AND REPARATIONS 8 (SUPP. II), (INSTITUTE OF JEWISH AFFAIRS, 1945-46).

[29] See, for instance, the British-Belgian agreement of June 7, 1948, on reciprocity in war damage compensation. Registration of claims was accepted from foreigners. 18 DEP'T STATE BULL. 278 (Feb. 29, 1948).

The assistance granted by the state consists of indemnification, graded according to the total funds of the damagees, and of guaranties for credits to them. A system of priorities is established,[30] based on the position of the damagee, the availability of manpower and material, the state of the Treasury, and the economic needs of the country; special considerations are given to small houses, furniture, small traders, and professionals. The law requires the damagee to use the indemnity for reconstruction purposes.

To implement compensation, Caisse Autonome des Dommages de Guerre was established by the law of May 19, 1948. It was guaranteed an appropriation by the state of 2.5 billion francs annually for fifteen years, and has certain other income provided by law.[31]

War damage compensation in Luxembourg is paid on the basis of the law of February 25, 1950, and the decree of March 15, 1950, on the declaration of such damage.[32] Compensation is granted for damage to property, for loss of income by persons damaged by the enemy, and for bodily harm. Destruction, deterioration, carrying off and loss of property caused by acts of war or occupation, pillage, evacuation, deportation, and similar events are considered damage to property. Eligible are Luxembourg citizens (even if they resided abroad) and stateless persons and foreigners who have resided in Luxembourg since 1930 and contributed signally to the welfare of the country. The first category has a right to indemnification, the two others may be compensated by a decision of the competent authorities. Excluded are persons who committed crimes against the state, participated in spoliation, whose conduct during occupation was not proper, etc.

Compensation is made, within the limits of the budgetary appropriations, on the basis of priorities which take into account the special needs of victims of Nazism, the financial position of the damagee, and the economic needs of the country. Consequently, in case of destruction of real estate, the same building must be reconstructed at the same place. In case of property losses, compensation is granted only if it serves to rehabilitate the damagee economically and socially. Reparation may also be made *in natura;* state bonds may be substituted for actual payment. All losses under 3,000 francs are excluded; similarly, indemnification is refused for luxury articles, not used for commerce.

Holland's war damage legislation is based on decrees F. 98 of June 16, 1945 and F. 255 of November 9, 1945, as well as on decrees of the Minister of Finance. According to these regulations, losses sustained in consequence of warfare, war activities, and measures taken by the enemy, including confiscation of household goods (except moneys, jewelry, and luxury articles), and industrial equipment and goods, are indemnified. Indemnification is limited in certain cases; for instance,

[30] Art. 8(3) of the law and decree of June 18, 1948.

[31] These amounts, apparently, are based on the total value of known claims, which on Nov. 30, 1948, amounted to over 35 billion francs. Belgians claimed 33,271 millions, foreigners the rest.

[32] Mémorial du Grand-Duché, March 27, 1950.

losses of household goods and similar objects are compensated only to the maximum amount of 5,000 florins. Otherwise the difference between the value of the object before and after the damage is considered the indemnifiable loss.

Holland is one of the few countries in which almost no difference exists between citizens and foreigners in the enjoyment of compensation, in so far as they reside there. Persons who on May 10, 1940 or later were of enemy nationality must obtain a non-enemy certificate.[33]

III

RESTITUTION[34]

A. Introductory

The problem of restitution of property confiscated from, or transferred under duress by, victims of racial, religious, or political persecution engaged the interest of the governments concerned from the very beginning of the war. This preoccupation was based on the experience in Germany and Austria during the years 1933-1939, and its main purpose was to assure the victims that spoliation would not be assented to and to impress upon the would-be acquirers that they would not be permitted to keep the assets after Allied victory. The Governments-in-Exile of Poland, Belgium, Luxembourg, Yugoslavia, Norway, and Greece issued laws and decrees to this effect. The Czechoslovak Government made a declaration which was given the validity of a law, and the French Committee of National Liberation made a decree ordering the execution of the United Nations Declaration of January 5, 1943 to which reference is made below. Of these measures, the Belgian, Luxembourgian, and Norwegian laws were put into operation and the French built their restitution legislation around the aforesaid decree. The Polish decree of November 30, 1939,[35] the Yugoslav decree of May 28, 1942,[36] the Czechoslovak declaration of December 19, 1941[37] and the Greek decree of October 22, 1941,[38] remained on the statute books of the Governments-in-Exile.[39]

[33] About the status of United States citizens and those of some other countries see decree of Sept. 10, 1947 and 17 DEP'T STATE BULL. 332 (Aug. 17, 1947) and 17 *id.* 910 (Nov. 9, 1947) and REPORT OF THE WAR CLAIMS COMMISSION 34 (Washington, 1950).

For the situation in the Netherlands Indies see REPORT OF THE WAR CLAIMS COMMISSION 36 (Washington, 1950).

[34] Asia (for instance, the Netherlands East Indies' Ordinance for juridical restoration published in Staatsblad 1947, No. 70; China, Hong-Kong) is not dealt with here. See, *i.a.*, 17 DEP'T STATE BULL. 835 (Oct. 26, 1947), 17 *id.* 1000 (Nov. 23), 17 *id.* 1090 (Dec. 7, 1947), and 18 *id.* 278 (Feb. 22, 1948).

Similarly, restitution of property seized as enemy assets remains outside the scope of this study. (For Japan and Thailand, see 17 DEP'T STATE BULL. 49 (July 6, 1947), 19 *id.* 245 (Aug. 22, 1948), 20 *id.* 433 (April 3, 1949), and 22 *id.* at 245 (Feb. 13, 1950); for the Netherlands East Indies, see REPORT OF THE WAR CLAIMS COMMISSION 36 (Washington, 1950)).

[35] Dziennik Ustaw Rzeczypospolitej Polskiej, No. 12, Dec. 2, 1939.

[36] Sluzbene Novine, June 18, 1942.

[37] Interallied Review, 1941, No. 11.

[38] Greek Official Gazette No. 172, Oct. 28, 1941.

[39] For their contents, see ROBINSON, INDEMNIFICATION AND REPARATIONS, *op. cit. supra*, note 28, at 118ff.

The problem of spoliation played a considerable role in the waging of the war. Through these acts Germany and her allies acquired large funds which they were able to use for purchases abroad, especially as far as gold, securities, and similar valuables were concerned. To counteract this tendency and to strengthen the morale of the despoiled, the Allies issued many warnings, the most important of which was the above-mentioned United Nations Declaration of January 5, 1943.[40]

Restitution is the undoing of deprivation of property. It must therefore be adapted to the confiscatory measures of the depriver. These measures varied in the various countries which at one time or another came under the direct or indirect control of Germany. Restitution is simple if the property was taken over by a central governmental body and remained in the possession of the government. It becomes more complicated if the confiscated property was later transferred to private persons. Still more complications arise if the assets were transferred under duress but by acts ostensibly legal. On the other hand, the measures used to effect restitution had to reflect the general legal and economic tendencies in the country of application (see, for instance, the cases of Hungary or Poland), as well as such imponderabilia as precedents, conservatism in legislation, etc. In some countries restitution legislation was enacted immediately after the end of the war; in others it took quite a long time. In the second case conservatory measures were sometimes enacted designed to make a census of the properties affected, prevent their dissipation, and prepare for actual restitution by permitting voluntary filing of claims. It is therefore hardly surprising that restitution legislation and implementation vary considerably from country to country. In some cases a large number of legislative acts (some of them—for example the Hungarian legislation—dealing with minute details of spoliation) have been promulgated; in other instances several laws, and in still others one single comprehensive enactment, exist. The authorities called upon to effect restitution are in certain cases administrative bodies (especially when the property is in the hands of governments); in others (even where simple restoration could be carried out by a public body) all action is taken by courts; there also exist semi-judicial bodies. The speed of effecting restitution depends on the body called upon to act, the number of court instances established, the more or less complicated nature of the procedure, and the zeal with which this remedy is applied. The picture therefore varies and in most instances hardly conforms to the expectations of a speedy restoration of violated rights.

A second type of divergency is created by the fact that a certain amount of spoliated property found its way into other countries than that of its origin. As a result, the countries involved may be divided into two major groups: countries of the original situs of the spoliated property and those to which such property was transferred under whatever guise (neutral countries).

Legally, restitution is the result of the wrongfulness of the act of alienation;

[40] CMD. No. 6418 (1943).

sometimes it is the result of an act (confiscation, seizure) or transaction (transfer under duress) which at the time it was committed or effected was "legal" under the existing arbitrary laws, especially if this happened in a country where sovereignty was exercised by the local authority (Germany, Italy, Rumania, etc.), even if this authority was under pressure of another state, and became illegal with the abrogation of the discriminatory legislation. In other cases (occupied countries) the acts and transactions were illegal *ab initio* (totally or partially)[41] from the viewpoint of the real sovereign, and in contradiction to existing international law;[42] sometimes they were even prohibited by the real sovereign.[43]

Ordinarily, the claimant has a right to restitution. But in some cases the competent authorities are granted wide powers of discretion in deciding upon restitution *per se* and the conditions under which it has to be effected. The legal remedy also varies: sometimes it is automatic nullity of the act or transaction which caused alienation; in other instances nullification is granted only upon request filed with the competent authority; often only a presumption of duress in favor of the owner is established. The legal value of the presumption is by no means uniform: it may be rebutted under strictly defined conditions only or it represents simply a reversal of the onus of proof.

In practice, restitution is not a simple act of returning property, because the transferred assets were used and did not remain untouched by time and wear and tear. Some property is consumed by use, other property loses a considerable part of its value; even real estate depreciates in time and is subject to deterioration. Mismanagement of the spoliated property causes further losses to the legal owners. On the other hand, most of the property provides income which—in the case of commercial and industrial enterprises—may over a long period of time even surpass the original value of the asset. Real estate (and in some instances, movables) may have been burdened with mortgages and other encumbrances by the illegal acquirer (the purpose of which varied from permanent improvements to raising moneys for the personal use of the possessor) or been destroyed by war acts or otherwise or, on the contrary, the possessor may have repaid such debts or made improvements in the assets. All this involves the problem of the responsibility of the possessor (or subsequent possessors) toward the owner and *vice versa,* which has found different solutions in various instances and countries. The foregoing is true to an even larger extent of commercial and industrial enterprises where management is the key to success, where stocks change rapidly and, in consequence of war scarcities, etc., may be completely exhausted or, due to good business, be increased manifold. Such enterprises may be combined with others or transformed into companies of a different legal personality or liquidated. If the asset was expressed in currency units it may have lost almost all of its value during alienation on account of inflation.

[41] The degree of illegality is also dependent on the temporary laws of the Governments-in-Exile mentioned above.

[42] See, for instance, the Fourth Hague Convention on Land Warfare.

[43] For example, under the aforementioned Greek decree of 1941.

Third parties are also involved in restitution, *e.g.*, owners of newly created mortgages, creditors of the alienated enterprises, etc.

In practice, a differentiation was often made in regard to restitution and the mutual responsibilities of the possessor and owner, between property confiscated outright and property transferred under duress against payment, as well as between the various degrees of duress exercised toward the owner, and between the persons who acquired the property in the knowledge of the previous confiscation or the duress in which the owner had found himself and those who did not have this knowledge, or between the first and subsequent acquirers. The problem of fair or unfair price paid by the acquirer was one of the most vexatious of all, as was the good or bad faith of third persons. In many instances (even when wrongful deprivation was generally assumed) movables and especially bearer certificates were as a rule held to have been acquired in good faith and restitution refused, unless proven otherwise; often the title of the acquirer was held to be so strong that movables were not restored at all. Bonds and stocks sold through ordinary channels constituted a special case.

A special problem was presented by the repayment of the consideration received because of the difference in the value at the two dates (loss and reacquisition), the circumstance that the owner had in many cases been deprived of the right to dispose of it and the fact that—due to persecution—the owner did not possess the funds when restitution was applied for. A similar problem was presented by repayment of income received from the property and the right of the possessor to compensation for management.

Even the person of the claimant provoked in practice serious difficulties. Many of the original owners had been annihilated together with their next of kin. In most countries the law admitted all legal heirs as claimants; in others the right of restitution was restricted to near relatives (for instance, Austria, Poland). The problem of the disposition of heirless or unclaimed property presented very serious difficulties and did not find a uniform solution.[44] Sometimes (for instance, in Yugoslavia and Hungary) a differentiation was made between persons living in the country of the situs of the property and absentees, the latter not always being recognized as claimants. The nationality of the owner was as a rule of no importance in regard to the right of restitution (contrary to war damage compensation), but in some instances restitution to foreigners was treated differently, as, for instance, in the case of "moral duress" in Belgium or apartments in France. The right of restitution was, as a general rule, also restricted in time, *i.e.*, deadlines were established whose end automatically annulled the right of the person concerned to claim restitution. Nationalization of property conflicted with restitution and, as a rule, was given priority over it. In such cases the kinds of property subject to restitution were reduced considerably.

The foregoing is a sample of the difficulties which restitution encountered in the

[44] This problem is dealt with in a separate article of this symposium.

various countries. No uniform solution was ever sought, much less applied. Furthermore, in many countries only the main features of restitution were considered by the legislators, while in others (especially in Germany) practically whole codes were written to effect restitution. But even the most detailed laws could not foresee all the problems involved in invalidating thousands upon thousands of transfers different in nature, duration, and conditions. This task devolved upon the courts (or other implementary bodies) which, in dealing with specific cases or on a general basis, had to fill the loopholes or clarify obscure provisions. The French court practice in restitution matters is very extensive and well publicized.[45] Austrian and German jurisprudence is becoming more and more voluminous,[46] while in other countries much less court practice is available. The volume of decisions depends on the number of cases, the complexity of the relations between restitutor and restitutee, and the attitude of the courts toward the whole problem.

The following presentation deals, for lack of space, mainly with the broad lines of the implementation of restitution in the various countries, since a detailed study of even a single nation with comprehensive legislation and practice would exhaust the space available for the whole article.

B. Restitution in Neutral Countries

Among the neutral countries, the main enactments are the Swiss, Swedish, and Portuguese.

The Swiss, as early as August 20, 1945, issued a decree concerning temporary measures (attachments) in expected lawsuits involving the right of ownership and possession of movables lost in war-stricken areas. The main purpose was to prevent the disappearance of the object. A further, more permanent, measure was enacted by the Federal Government on December 10, 1945, *viz.*, the decree concerning lawsuits involving restitution of property alienated in occupied countries.[47] The decree deals with movables and securities (except those imported on the basis of normal international trade agreements) of which the owner was deprived in occupied countries, contrary to international law or by force, confiscation, requisition, or similar action of the military and civil authorities of the occupant; it is also applicable to cases where the owner transferred the property voluntarily but under the influence of deception or of well-founded fear for which the aforesaid authorities were responsible. The decree distinguishes between a *bona* and a *mala fide* acquirer: the former is entitled to repayment of the consideration paid to the seller, except when the applicable ordinary law provides otherwise. If the legal owner received compensation for the alienation, he has to repay it when the property is

[45] For years, practically every issue of the Gazette du Palais carried several such decisions.

[46] For Austria, see, *i.a.*, HELLER-RAUCHER, DIE RECHTSPRECHUNG DER RUECKSTELLUNGSKOMMISSIONEN (Vienna, 1949).

For German court practice see RECHTSPRECHUNG ZUM WIEDERGUTMACHUNGSRECHT, an appendix to the NEUE JURISTISCHE WOCHENSCHRIFT.

[47] See also the decree of Feb. 22, 1946, concerning the search for property looted from occupied countries.

restituted. The rights of third persons in the property are annulled. All these cases are dealt with by a special chamber of the Federal Supreme Court.

On June 29, 1945, Sweden promulgated a law concerning restitution of certain properties emanating from an occupied country, and another on control of certain foreign property.[48] The first law provided for the obligation to restore property found in Sweden which had been seized contrary to rules of international law by violence or threat or other improper means by the occupying power, as well as assets of which the owner had been deprived by pillage; properties imported into Sweden on the basis of an international agreement were exempted. The implementation of the law was entrusted to a Board with full powers to seize and restore the property, order compensation, and provide for other required measures; it was authorized to refer the case to ordinary courts with the consent of the possessor of the spoliated property. The second law served mainly to preserve from sale or other disposition such property as might be subject to restitution.

Portugal enacted Decree-Law No. 34455 of March 23, 1945 on spoliated properties and implemented it by Decree No. 34600 of May 14, 1945, providing for the nullity of transactions in personal property imported into Portgual when it could be proven that the owners had been despoiled by acts of the military occupant or by confiscation. Decisions are rendered by courts. These enactments also deal with transactions in negotiable instruments, registration of properties, investigation of the origin of the properties, etc.

C. Restitution in Belligerent Countries

1. *Bulgaria.* Bulgaria enacted legislative measures which were the result of the specific conditions under which the transfer had occurred previously, *viz.*, the liquidation of these assets through the Commissariat of Jewish Affairs.[49] According to the decree-law of February 24, 1945 on the material consequences of the abrogation of anti-Jewish laws,[50] all real estate confiscated by the state was restituted to the owners; if it had been transferred in the meantime to third persons, the transfer was to be annulled by the authorities. Acquisition of property in rural communities was to be annulled upon request of the owner. Confiscated enterprises, movables, moneys, and valuables were returned, otherwise compensation was paid. Sales of movables effected by the Commissariat or Tax Collector and liquidation of enterprises were declared void. Transfers to third persons made after August 31, 1944, were void; earlier transfers could be declared null if the possessor knew of their origin. Similarly, all transfers of shares, businesses, and participations by the despoiled persons themselves or by the Commissariat to third persons effected after September 1, 1940, could be declared void, but only upon an application which had to be made within three months from the effective date of the decree. The decree also contained

[48] SWEDISH STATUTE BOOK (July 14, 1945).

[49] For a brief review of spoliation in this and other cases see *i.a.*, HITLER'S TEN YEAR WAR ON THE JEWS (INSTITUTE OF JEWISH AFFAIRS, New York, 1943).

[50] Journal Officiel, March 2, 1945.

a number of special regulations concerning revalidation of insurances, restitution of pharmacies, compensation for non-restitutable property, etc.

2. *Norway.* The situation in Norway is in some respects similar to that in Bulgaria. The law of December 18, 1942, enacted by the Government-in-Exile, was in effect only until replaced by the provisional law of September 21, 1945[51] and by the Law No. 27 of December 13, 1946, on confiscated property. Since the property of persecutees had been taken over during the war by the Liquidation Office for Confiscated Property, the laws of 1945 and 1946 established a Restitution Office for such property which administers all confiscated assets and assists former owners to regain them. Real estate and mortgages are restituted unconditionally, regardless of the good faith of the present possessor. The same is true in most cases of movables, but shares are restored in certain instances only. The Restitution Office pays back to the owners the accumulated balances for property disposed of during the war (in cases where no restitution has taken place); the difference between the amounts repaid and the total value is considered as war damage.

3. *Luxembourg.* Restitution in Luxembourg is based on the decree of April 22, 1941 as amended on July 7, 1944.[52] According to these enactments, all acts of disposition and encumbrances of properties which were subjected by the enemy, since May 10, 1940, to confiscation, seizure, forced sales, and other measures violating private property, are null and void. They may be reclaimed from every possessor without repayment of the price; the possessor has only the right of claiming the amount paid from the seller. The courts have to order the seizure of such properties; in the absence of restitution the judge has to impose, for the benefit of the damaged party, an indemnity equal to their value.[53]

4. *Greece.* The Greek restitution legislation is based on three laws: Law No. 2 of October 25, 1944, Law No. 337 of May 20, 1945, and Law No. 808 of December 31, 1945. A large portion of confiscated property was in the possession of the Greek Treasury; therefore the legislation deals with the restitution of properties held or sought by the Treasury, or in the hands of appointed administrators or of private persons. The Treasury restitutes the property in the same way as it received it; if the assets are in the hands of administrators or private persons, the claimant has to submit to the holder a request for restitution through a judicial constable. If the property is not restored within 15 days from the receipt of the request, a claimant has the choice of appealing to court or to the Jewish Property Restitution Bureau. Special provisions exist for movables: the administrator is required to restore them to the Properties Administration Bureau without special application. All possessors of properties coming under the law must report them to the authorities.

[51] Norsk Lovtidend No. 15, Sept. 21, 1945.

[52] Both texts were published in the Mémorial du Grand-Duché de Luxembourg, Sept. 18, 1944.

[53] *Cf.* the decree of August 17, 1944 (Mémorial, Sept. 20) concerning the sequestration of enemy property. This decree permits the Office of Sequestration to seize all properties which belonged after May 10, 1940, to the enemy state even if they were transferred to third persons who acted in bad faith. On the basis thereof many a restitutable property came under the jurisdiction of the Office.

The administrators are required to submit an account of their activity. Leases made during dispossession are invalid. Those authorized to request restitution are the owners, their relatives up to the fourth degree, or relatives by marriage acting as trustees.

If assets received by an administrator are non-existent, the owner is entitled to compensation; a special application to this effect must be filed with the courts.

5. *Italy.* In Italy two periods of alienation are to be discerned: before and after the abdication of Mussolini (and the establishment of the new Fascist regime). Decree No. 26 of January 5, 1944, dealing with the first period, distinguishes between real estate which was forcibly transferred to the Institute for the Administration and Liquidation of Immovable Property (on the basis of Law No. 126 dated February 9, 1939) and still in its possession; property which the Institute transferred to third parties; gifts; enterprises sold to third persons; enterprises transferred to incorporated companies by the authorities; and other property. In the first two cases the owner has the right to request restitution upon return of the consideration received. Other real estate can be reclaimed if there is incontestable proof that the transfer was made to avoid the application of racial legislation. Gifts can be revoked only with the consent of the other party. On the other hand, private enterprises and partnerships transferred to third parties or given to "incorporated companies" may be reclaimed upon repayment of the consideration received. Special provisions exist for improvements, income from normal management, mortgages, etc.

Spoliation not covered by the foregoing decree was dealt with by Decree-Law No. 222 of April 12, 1945, concerning supplementary norms.[54] It provides for the right to cancel gifts, for the belated acceptance of inheritances and legacies, and for the cancellation of transfers made under the compulsion of racial legislation (provided the damage sustained exceeds one-fourth of the value of the property), and of fictitious contracts made to evade the application of the racial legislation.

The legislative decree of May 5, 1946,[55] treating of property confiscated, sequestrated, or otherwise alienated under the regime of the so-called Government of the Social Republic, permits reclamation of all such properties from any possessor, except in case of third persons who acted in good faith. The law provides for an accounting by the possessor for the period of his administration and for payment of damages which occurred during his administration unless they were due to causes beyond his control. If the property was in the possession of the state the owner may claim, instead of restitution, the amount received from the sale of the property, including any increase in the selling price by subsequent transfers.

6. *Rumania.* In Rumania several periods of more or less vigorous persecution existed. Accordingly, the restitution legislation has established different criteria for various periods.

[54] Gazzetta Ufficiale, May 22, 1945. An additional law relating to restitution is Decree-Law No. 896 of April 24, 1948 concerning restitution of property removed by the Germans.

[55] Gazzetta Ufficiale, June 7, 1946.

The decree-law of July 30, 1945, concerning the annulment and revocation of certain acts of transfer concluded under exceptional circumstances,[56] distinguishes between four kinds of transfers. The first embraces a large number of transfers: transfers made under the "Rumanization" program to certain officials and other beneficiaries of this program or by owners who were detained, imprisoned or deported, or cases in which the property involved was, under the laws of the country, subject to transfer to the state, or in which the transfer was financed with state funds. In all these instances the transfer is to be voided upon application by the former owner; however, in certain cases the applicant has to prove that the transfer caused him a loss. In the second category of transfers the law establishes only a refutable presumption of duress; these include, *i.a.*, transfers of small businesses within a certain period of time, as well as contracts concluded in the earlier period of persecution with members of certain organizations. A third category consists of so-called simulated transfers, for instance, transfers to former associates or employees of the transferor, or transfers providing for the financing of the enterprise by the transferor. Finally, the law provides for the revocation of all donations made within the period of persecution to avoid the consequences thereof.

The treatment of third parties differs in the various instances; while in the first two the annulment works unconditionally also against third parties who acquired real rights in the transferred property, in the case of movables, third parties are affected only if bad faith exists. Bad faith exists if the third party knew of the origin of the goods or—where enterprises are involved—if the acquirer cannot prove lack of such knowledge. As a rule, the owner has to receive the property in the same condition as when it was transferred. Therefore he must be compensated for losses (except those caused by possessors in good faith), and repay the consideration received and all investments and expenditures for extensive repairs made, within six months; real rights established after the transfer are charged to the purchase price.

Annulment and voidance are conditioned upon an application being made within three months from the date of the law; longer time limits are granted to absentees and deportees. Decisions are made by the civil courts, which apply accelerated procedures and eased proofs.

Special measures of restitution were introduced in North Transylvania (which was under Hungarian domination during the war) by the decree-law of August 13, 1945. The decree provides three remedies: (a) annulment of transfers, pure and simple; (b) a presumption of duress; (c) annulment on certain conditions. The first category comprises transfers concluded between August 30, 1940, and October 25, 1944, if the claimant lived in North Transylvania and was subject to deprivation of liberty, or if he lost his position as a result of persecution, or suffered a loss amounting to at least 50 per cent of the value, or was deported, expelled, or fled and suffered

[56] Monitorul Official, August 1, 1945. The earlier decree of Dec. 19, 1944, dealt only with certain aspects of restitution.

a loss of at least 25 per cent, or if the property was put under forced administration and the loss amounted to at least 25 per cent. Claimants who suffered a loss of at least 25 per cent but do not come within the first category may request annulment on the basis of a presumption of duress. The third category embraces transfers made under threat of expulsion, deportation, arrest, etc., as well as expropriation for public purposes if the property was transferred to private persons afterwards. The annulment operates also against subsequent acquirers but, in the case of movables, only if they were aware of the conditions under which the first transfer had taken place.

In addition to restitution, the former owner is entitled to compensation for the deterioration of the objects, but must repay the purchase price and refund all expenses which resulted in an increase of the value; there is no obligation to repay the income derived.

7. *Yugoslavia.* Yugoslavia has restricted restitution for a number of reasons. The law of May 24, 1945, as amended on August 2, 1946, denies restitution to all citizens of Yugoslavia living abroad who refuse to return to the country. Another restriction is imposed by the provision that property whose restitution is contrary to the interest of the national economy, or national reconstruction, or the military security of the country is not restitutable provided a request to this effect is made by the competent authority within the specified period; however, the law provides for the payment of compensation in such instances. Restrictions of another nature exist in regard to the assignment of the administration of properties to near relatives of absent owners: the courts may decide to assign to them only a part of the total assets; moneys, securities, and valuables are to be assigned only if this is required for the administration of the enterprise.

Restitution is granted in all cases of properties, whose owners had to leave the country during occupation, of which they were deprived against their will, or which were transferred under the pressure of the occupant to third persons, regardless of who is in their possession, or the basis of possession. Property within the meaning of the law is real estate, businesses, securities, and property rights, including premises. The owner is entitled to the restitution of the income derived, within the limits of relevant provisions of the Civil Code. The same rules are applicable to businesses; however, in the case of enterprises which were in business during the occupation, restitution of the sold movables cannot be claimed. Real rights created after dispossession are to be annulled, except those covering investments made. Real rights achieved by a *bona fide* possessor are to be compensated by the owner; in the case of *mala fide* possessors the amount is due to the state. In case of damages or losses to the property, the owner is entitled to claim compensation.

All cases of restitution are to be dealt with by the courts. Until a court decision is reached the property is administered by special state organs. In order to facilitate restitution, the law decrees the obligatory registration of all properties coming under

its provisions within a month from the date of publication of such an order, and their transfer to the Committee for National Property.

8. *Poland.* The Polish decree of March 8, 1946[57] contains two sets of restrictions on restitution: (a) properties transferred to the state on the basis of the nationalization law of January 3, 1946, and those coming under the law of the agrarian reform and similar enactments are exempt from restitution; (b) only the owner, his ascendants and descendants, spouses, brothers, and sisters are entitled to ask for restitution. As in the case of Yugoslavia, the properties are, pending restitution, administered by a special authority (State Offices of Liquidation).

Properties coming under the law are considered as abandoned and are divided into three groups: (a) properties of persons who lost possession thereof as a result of the war, including assets seized or confiscated by the occupant; (b) properties assigned to third persons for safeguarding; and (c) rental rights to business premises representing an indivisible part of the business.

Restitution is the result of the nullity of the acts of the occupant or of the legal transaction involved. In order to obtain restitution the owner or his heirs must institute proceedings with the town court of the situs of the property, unless the authority administering the asset consents to its return. The courts apply the usual procedure but with such deviations as are required to speed up the decision; proofs are relaxed considerably.

Under the law, all possessors of the property (except those who were entrusted with it) are considered to be in bad faith if they acquired it by a void act or transaction. They must repay the income derived and are not entitled to claim the return of investments even if the value of the property was enhanced thereby. Only the state and public bodies and *bona fide* possessors are repaid the amount of investments to the extent of the increase in value.

One of the peculiarities of the Polish decree, which makes it unique and is the result of the general legal insecurity, is the provision that the claimant, if he is not the owner according to the register of deeds or similar registers, does not acquire the ownership of the property through restitution but only the right of administration and usufruct; ownership is acquired either by additional (normal) procedure or by undisputed possession within 10 years. During this period persons with better rights (for instance, closer relatives) may file a claim for the same property. Another peculiarity is the requirement of a special registration tax representing a certain percentage of the value.

9. *Czechoslovakia.* Czechoslovakia has introduced in its restitution legislation the notion of persons excluded from the remedy which—as seen above—is usual in war damage compensation: "nationally untrustworthy" persons have no right to regain their lost property. It has also made a distinction in respect to the social position of the owner.

[57] The earlier law of May 6, 1945, was amended by this decree.

The restitution legislation of Czechoslovakia consists of two enactments: the decree of May 19, 1945 on the invalidity of certain legal transactions, and the law of May 16, 1946, issued to implement the first decree.[58]

The first decree, although providing for the nullity of transfers effected under the pressure of the occupant, left the implementation of this rule to further legislation, except in so far as special rules were laid down in the decree concerning the restitution of property in the possession of nationally unreliable persons (namely, members of the German and Hungarian national parties and groups including persons who identified themselves with these groups, except those who can prove their loyalty to the Republic; persons engaged in activities contrary to the interests of the Czechoslovak Republic; and certain companies). In such cases, owners who are workers, farmers, craftsmen, small and medium industrialists and merchants, civil servants, professionals, and persons in similar positions are entitled to request restitution (provided they are not nationally unreliable) from the state authority which administered their property.

The law of 1946 invalidated all transfers and transactions concluded subsequently to September 29, 1938, under pressure of occupation or persecution, except when the acquirer is a nationally reliable person and can prove that he paid a fair price and acted either on the request or in the interest of the former owner. Similarly treated are transfers based on revoked regulations which were contrary to the Czechoslovak Constitution or on which racial, national, or political persecution was based. The owner and his successors in right may reclaim the property from the possessor. Exempt from restitution are properties in the hands of third acquirers who prove that they neither knew nor could have known of the original duress; all acquirers are jointly responsible for the damage. The claim is aimed at restitution of the property or restoration of the former situation. If this is impossible or the owner has no interest therein, or if the present possessor urgently needs the movables, compensation may be ordered in lieu of restitution. Restitution or restoration is also considered impossible if it militates against important public interests. The possessor is responsible as a *mala fide* acquirer for losses, income, expenses, etc.; if he was forced to acquire the property or safeguarded it against loss, his responsibility is only that of a *bona fide* acquirer. On the other hand, the former owner is required to restore the consideration or anything else he received.

All claims under the 1946 law are considered by the court of the residence of the respondent or the situs of the property.

10. *Belgium*. Belgium has gone its own way in matters of restitution. On January 10, 1941, the Belgian Government-in-Exile issued a decree and an implementary law on the measures taken by the occupant.[59] These acts nullified all those measures *ab initio* regardless of whether they involved public law, administrative measures, the social order, private law, or the interests of the citizens. The imple-

[58] Sbirka Zakonu a nařizena republiky Czechoslovenske No. 55, June 17, 1946.

[59] Moniteur Belge, Feb. 25, 1941; see also the explanatory note to this legislation, *ibid.*

mentary law stipulated that all acts of disposition or burdening of property effected by the enemy after May 10, 1941, through confiscation, seizure, forced sales, or similar measures, were null and void. In consequence, the owner might reclaim the property from any possessor, within three years from the end of the war; the latter was not entitled to reimbursement from the owner of the price paid but might seek redress from the seller. No difference was made between *bona* and *mala fide* acquirers.

The above enactment thus dealt with acts and transactions resulting from a direct measure of the enemy but did not touch upon transfers made to evade forced sales or to procure moneys required to subsist, or to transfers made before deportation, hiding, etc. To fill out this gap, Belgium on April 12, 1947, enacted a law establishing a legal presumption in favor of certain persons, victims of "moral" compulsion. Under this law come all transactions concluded during the occupation by persons who on account of their race, nationality, opinions, political activity, or residence were exposed to measures of spoliation or sequestration by the occupant or his agents. It established a legal presumption that all these transactions were carried out under "moral" compulsion and may therefore be annulled in accordance with the respective provisions of civil law, thereby facilitating the establishment of proof of duress by the persecutees. The presumption may be refuted if the acquirer proves that the transaction would have also taken place on similar terms in the absence of persecution. In the case of third acquirers, the owner must prove that they knew of the origin of the property; however, the presumption is valid with regard to subsequent acquirers if the property consists of real estate, businesses, and other assets whose transfer is subject to public notice. The remedy of the law was granted to United Nations nationals and to nationals of neutral countries, stateless persons, and citizens of enemy states expelled from their country because of their race or opinion, but only if they had been admitted to an Allied country before September 1, 1939.

The problem of restitution of premises was dealt with in Belgium by a special decree, that of March 12, 1945,[60] which provides for the possible reinstatement in their lost apartments of tenants who lost their homes or professional premises under duress, regardless of the good faith of the new lessees. The judge is granted wide powers of discretion with respect to reinstatement and the delays which he may grant to the present tenant.

Similarly, the problem of lost securities was treated separately;[61] it was provided, *i.a.*, that the dispossessed holder of bearer certificates might request restitution from any person who acquired them prior to publication, and that he need not re-

[60] *Id.*, March 15, 1945.

[61] Decree-law of May 18, 1945, concerning involuntary dispossession of bearer certificates (*Id.*, May 30, 1945).

Cf. the Ministerial Order of May 26, 1945 (*Id.*, June 1, 1945) concerning evidence of ownership in Belgian bearer certificates.

imburse the purchase price if acquisition was made within a specified term, unless bought on the stock exchange or from a registered bank.

11. *Hungary.* The restitution legislation of Hungary is even more peculiar. It consists of a considerable number of enactments which vary in their provisions and application.[62] In general, transfers of a usurious nature made under duress, as well as unilateral payments made during the period of persecution, are voidable. Duress is presumed on the basis of the existence of a discriminatory decree. At the same time the existence of losses as a result of the transaction is to be verified. Business premises, real estate used for business, fixtures, goods, and stocks of stores, and movables are restitutable if they were lost on account of the owner's being a Jew. Special regulations exist in regard to certain licenses (for pharmacies, etc.). Excluded from restitution is landed property affected by the agrarian reform law. If the movables are in the possession of public authorities or institutions, political parties, and some other institutions, the right of reclamation is suspended, although the right of claim remains valid. If confiscated clothing, household implements, and furniture were assigned to persons in an emergency situation, they cannot be reclaimed as long as the emergency persists. A further peculiarity is the provision that the competent authorities may order a division of the lost premises or goods between the legal owner and the acquirer; in certain instances the claim may be rejected, and in others only the right to compensation is granted. Movables cannot be reclaimed from a subsequent acquirer, unless he is closely related to the first acquirer or the transfer was gratuitous. There are also special rules concerning animals, private collections, and some other goods.

The right to restitution is restricted to the owner, his spouse, children, grandchildren, brothers, and sisters. In the absence of any such persons, a custodian is appointed to make the claim. Abandoned property of absentees is forfeited to the state; an exception may be made for persons who left the country to evade the application of discriminatory legislation.

Ordinarily courts are competent to deal with restitution cases. However, if the property lost consists of premises, stores, and furniture, the claim may be filed with a special arbitration commission.

12. *Holland.* Restitution in Holland, based on Decree No. E. 100, of September 17, 1944, as amended by Decree F. 272 of November 16, 1945, is not of a mandatory nature, as is usual elsewhere, but is largely left to the discretion of the Council for Reestablishment of Justice. Under the law, the Council is authorized to declare null and void, totally or partially, legal relations affected or changed during enemy occupation if, in its judgment, the omission of such intervention would be inequitable. Such omission—unless the contrary is proven—would be inequitable if the change was effected by force or under undue influence of the occupant or persons acting in his stead or without legal cause or on the basis of enactments by the enemy

[62] The most important of them are Order 200/1945 M.E. Feb. 5, 1945; Decree 7.590/1945; Decree No. 10490 of Sept. 11, 1946; Decree No. 300/1946; and Law No. XXVIII of May 24, 1945.

which have been declared void.[63] All decisions are made on the basis of equity and justice. Acting under the authority of the law, the Council may order restitution of the alienated objects and rights, unless the possessor proves his good faith (*i.e.*, the absence of knowledge or suspicion that the object was lost under such conditions as would make restitution inequitable) in acquiring them, or that he obtained them from a third party against payment or from a person who had acquired them against remuneration; an exception is made in cases where the object is of considerably higher value to the owner than to the possessor.

If restitution is ordered, the owner must, as a rule, repay the consideration received and compensate the possessor if the ground for restitution is the higher value to him. Real rights established during alienation are annulled, except if acquired in good faith or against payment. The Council decides at its discretion about the fate of personal rights and the income derived. If restitution of the object or income is not ordered, although it would be in the power of the Council to do so; if the object was lost; if the rights of third persons in the object are maintained; if restitution is made against payment; or if the restituted objects suffered damage which would not have occurred in the absence of alienation, the Council grants compensation to the owner. All *mala fide* possessors are held responsible; the amount of compensation is equal to the loss the owner sustained by not having the property restored or by having it restored with encumbrances or against payment.

There are special rules for restitution of stocks and bonds. They are to be registered and delivered to the registering body; claimants to such stocks and bonds have to turn to this body for recognition. Recognition is granted if ownership and subsequent loss are proven.

Properties confiscated by German authorities are dealt with by three bodies: (a) the Custodian of the Deutsche Revisions-und Treuhand A. G., if the assets were sold (merchandise, bank balances, debts, and other liquid assets); (b) the Custodian of Lippmann, Rosenthal & Co., for Jewish property; (c) the Trusteeship for Enemy Household Goods, for furniture and household goods.[64]

13. *France.* In France[65] restitution has proceeded in several stages. Following the decree of November 12, 1943, issued by the French Committee for National Liberation,[66] the Provisional Government on October 16, 1944, enacted a decree

[63] *Cf.* the decree of Sept. 17, 1944 on the legal effect of occupation measures.

It is noteworthy that Holland was the only occupied country which did not enact any provisions of this kind during the war.

[64] For further details, see Department of State Press Releases Nos. 255 (March 27, 1947), 357 (April 28, 1947) and 617 (July 31, 1947).

[65] The first territory to be freed from occupation and to enact restitution legislation was French North Africa. See the Giraud decree of March 14, 1943, the decree of April 3, 1943 of the Governor-General of Algeria, and the corresponding regulations in the other territories.

Decree No. 45-770 of April 21, 1945, was also made applicable in Algeria. Special decrees were issued to apply this decree in other French territories (see, for instance, Decrees Nos. 49-611 of April 21, 1949 and 46-493 of Feb. 1, 1950, extending the validity of some of the French restitution laws to Indo-China).

[66] Journal Officiel, Nov. 18, 1943.

providing for immediate restitution of properties which had been entrusted to the Administration of Domains in accordance with the anti-Jewish legislation and had not been sold or transferred to third persons. Restitution was effected *ex officio* by the competent authority or on the basis of a simple demand by the owner. The next step was the decree of November 14, 1944, amended by the decree of February 2, 1945 dealing with properties which had been subjected to acts of sequestration, provisional administration, or management or liquidation on the basis of legal measures of the Vichy Government or the German occupant. The owner of such properties automatically regained them upon request addressed to the administrator or manager thereof, provided they had not been subjected to acts of liquidation or disposition by August 19, 1944 (the date of restoration of Republican legality). Restitution had to be effected within a month and an account of administration or liquidation submitted within two months. If the property had been liquidated or disposed of, the owner was entitled to receive the corresponding amount, maintaining his rights in all other respects. The owner had to comply with the engagements entered into by proper acts of the administrator.[67]

To deal with the more complex problem of properties which had been subjected to acts of disposal or forced transfer, the French Government enacted Decree No. 45.770 of April 21, 1945[68] (amended on June 19, 1947 by granting the possibility of annulling bankruptcy and judicial liquidation decisions in the same way as had earlier been provided in case of transfers). Here a distinction is made between exorbitant measures of common law and "voluntary" transfers.

Persons whose properties, rights, and interests were subjected—even though with their material concurrence—to acts of disposition through sequestration, provisional administration, management, liquidation, confiscation, or any other "exorbitant measure" of common law in force on June 16, 1940, in consequence of legislative and other acts of the Vichy Government or of the German authorities, are entitled to establish the nullity of the acts of disposition. The dispossessed owner regains the properties, rights, and interests without obligations and mortgages assumed by the possessors, but with all improvements and new accessories. The first and subsequent possessors are generally regarded as of *mala fides,* unless they prove that they acquired possession upon demand of the Vichy authorities and either to avoid the transfer of economically or artistically valuable goods to the occupant or to safeguard the interests of the dispossesed owner in an accord with the latter. *Mala fide* possessors are not entitled to invoke the right of retention for their claims and are bound to restore to the owner all usufructs (natural, industrial, and civil) beginning with the date of retroactive nullity; *bona fide* possessors are also obliged to return the usufructs. The owner regaining his property is bound to repay to the possessor the

[67] *Cf.* the decree of Feb. 9, 1945 concerning the responsibility of administrators; that of Jan. 9, 1945 regarding illicit profits made by administrators; and that of Feb. 3, 1945 (amended on May 23, 1945) on expenses of administration.

[68] Journal Officiel, April 22, 1945.

price paid by the latter, including the interest thereon, but only to the limit the owner has profited from this amount. The possessor may demand, furthermore, the reimbursement of the necessary expenses made for repairs, etc., and the useful expenses so far as the value of the property was augmented thereby. In such cases, the judge is obliged to grant the owner sufficient time to enable him to repay these amounts out of income from the property. The possessor is responsible for losses incurred through his acts of commission and omission; if the owner is unable to obtain the indemnity because of the absence or bankruptcy of the possessor or the administrator, the state will reimburse him in accordance with provisions to be promulgated in respect of war damage. If the properties, rights, and interests have been impaired or partially lost, the owner is *ipsa lege* substituted for the possessor in all of the latter's actions or rights against the insurer or third persons responsible for the damage.

Alienated movables are treated in accordance with the legal provisions for lost or stolen goods; they may be reclaimed within one year after the legal cessation of hostilities.

As far as "voluntary" transfers are concerned, the law provides for the legal presumption that contracts made after June 16, 1940, concerning the transfer of movables, of rights to real estate and commercial enterprises, of rights to industrial, literary, and artistic properties, of partnerships in commercial firms, and of securities and similar valuables, made either by direct transfer of title to the bearer or contracts on registered stock by persons enumerated above, are considered as having been concluded under duress. However, if the possessor proves that he paid a fair price, the burden of the proof of the existence of duress rests on the former owner. The consequences of annulling the contract are those attributed by common law to nullity resulting from lack of consent; the former owner is obliged to reimburse the price paid, the necessary expenses for repairs, etc., and those which have augmented the value of the property or right, within the limits of this increase. The possessor is entitled to retain the usufructs up to the date of the request for annulment. The same rules are applicable in case of transfers without remuneration. Delays in repaying the costs of improvements may be accorded to the owner. If the possessor knew the actual position of the owner and did not pay a fair price, the rules laid down in regard to forced transfers are to be applied.

The law provides certain exceptions to the general rule of nullity and restitution. First, its provisions are not applied to securities sold on the stock exchange or through a banking institution without indication of the owner, unless the first or any subsequent possessor knew their origin. Furthermore, the law is not applicable to goods, rights, and interests requisitioned or expropriated for public purposes or acquired by the state in consequence of its right of eminent domain, unless these goods, rights, and interests were put under sequestration or provisional administration in consequence of the laws and regulations of Vichy, and the authorities decide that

their remaining in state ownership does not comport any more with the concept of a public purpose. The owner must repay the amount equal to that fixed at the time of acquisition.

The law provides a remedy in case of an increase in the number of shares effected after the transfer of the original number: the owner is entitled to demand their cession by paying the amount of subscription. If the owner has become a holder of minority stock, he is entitled to refuse to take it back and to demand instead its value on the day of the request for restitution.

To facilitate restitution, the law prescribed that transfers of goods, rights, and interests falling under this law made after the coming into force of the law of August 9, 1944, concerning the restoration of Republican Legality, were null and void. Whoever held or had held, under any title whatever, goods, rights, or interests coming under the law, was obliged to declare them to the Ministry of Finance within a month, stating the name of the former owner, and the manner in which he had acquired and transferred them; the same obligation was incumbent on persons who had received any kind of movables in trust after June 16, 1940.

Restitution by amicable settlement was facilitated through the provision that the court had to assess on *mala fide* acquirers an amount equal to 10 per cent of the value in favor of the Treasury; similarly, upon request of the Ministry, the difference between the fair price and the price actually paid could be levied on the acquirer as a "civil" fine if that difference exceeded one fourth of the fair value.

The three decrees were supplemented by Decree No. 45-1224 of June 9, 1945, concerning transfers and transactions apparently legal made in favor of the enemy; the decree of November 14, 1944, concerning restitution of premises; the decree of April 11, 1945, relating to movables pillaged by the enemy and recovered by the state; the law of September 4, 1947, concerning the assimilation of certain dispossessions to war damages; and Law No. 48-978 of June 16, 1948, providing for the repayment of the amounts levied on the proceeds of alienation or other spoliation by acts of the Vichy Government.

14. *Austria.* The main peculiarity of restitution in Austria, which makes it unique, is the distinction made between "restoration" (*Rueckgabe*) and "restitution" (*Rueckstellung*). The first deals with properties alienated between March 5, 1933 and March 13, 1938 (the Schuschnigg period), the second with assets expropriated or forcibly transferred during the period of German domination.

Restoration is based on the laws of February 7, 1947 and June 22, 1949.[69] They provide for the restoration of properties which were owned by democratic organizations in the political, economic, and cultural fields (Social-Democratic Party, Christian Labor Organization, Communist Party, and their associations) and confiscated or alienated without remuneration on the basis of measures inconsistent with the laws in force on March 5, 1933. Restoration of the cancelled leases to houses and plots of which these organizations were deprived is also provided for.

[69] Bundesgesetzblatt (BGBL), 1947, No. 55 and 1949, No. 165.

Restitution has been a slow process in Austria. Action began on May 10, 1945, with a decree providing for a census of Aryanized or otherwise alienated properties; it was followed up by the law of February 1, 1946 providing for the appointment of public administrators (which was disapproved by the Allies and became law in the amended form of July 26, 1946).

Restitution in Austria has followed procedurally the same course as in France. As in the latter, the first enactment was a general nullification of all transactions and other legal acts made during German occupation in connection with its political and economic penetration of Austria.[70] It was followed by the First Restitution Law of July 23, 1946[71] which provided for the restitution of alienated properties at that time under the administration of the Austrian Federation or Laender. The properties were to be restituted in the existing state with the available usufruct. Real rights established for the benefit of third persons were declared void; expenses incurred during alienation were to be repaid on the same basis as provided for *negotiorum gestors*. The law restricted the right of claim to spouses, ascendants and descendants, brothers and sisters of the owner, and children of the brothers and sisters; other relatives were entitled to claim the property only if they had lived in the same household with the owner. Restitution had to be effected by decision of the Finance Land Office or the authority which administered the property; appeals to the Ministry of Property Control were permissible. The second measure of restitution, the law of February 6, 1947[72] (Second Restitution Law), provided for restitution of properties alienated arbitrarily or by virtue of laws, on racial and similar grounds, which thereby became the property of the Austrian Republic. The terms of restitution were the same as in the First Restitution Law; and the same authorities passed upon the applications.

The basic enactment is the Third Restitution Law of February 6, 1947[73] dealing with restitution of properties wrongfully alienated during the German occupation, arbitrarily or on the basis of laws or other enactments, including legal transactions or other legal action. Such alienation is especially assumed if the owner was subjected to political (including racial) persecution by the Nazis and the acquirer does not prove that the transfer of property would have taken place independently of the seizure of power by the Nazis. In the absence of political persecution, wrongful alienation is not assumed if the acquirer proves that the owner freely chose the buyer and received adequate compensation, or that the transfer would have taken place independently of Nazi accession to power. However, not all alienated properties are subject to restitution; movables acquired at a public auction or from a businessman authorized to deal in such property, and similar cases are exempted from the provisions of the law. If the movables were acquired at the establishment

[70] Law of May 15, 1946 (BGBL, 1946, No. 109).
[71] BGBL, 1946, No. 156; see also the implementary decree thereto in BGBL, 1947, No. 167.
[72] BGBL, 1947, No. 53.
[73] BGBL, 1947, No. 54; see amendment of June 18, 1947 in BGBL, 1947, No. 148.

of the legal owner, restitution is admissible only if the consideration paid was inadequate. Another deviation from the principle of restitution relates to agricultural and forestry properties used for parceling. If restitution is inadvisable because of the economic changes the property has undergone, restitution may be superseded by adequate compensation or (with the consent of the owner) by replacement or by assignment of a part ownership of the changed property. The owner is to repay to the possessor the consideration received within the limits of his free disposal thereof, except that in case of an orderly transaction the non-received price may also be ordered restored. The possessor is responsible for losses due to his fault; he must, as a rule, deliver the usufructs but is entitled to reimbursement of his regular expenses. As a rule, all easements created after alienation are void, but some exceptions are admitted. Restitution is made on the basis of amicable settlements or decisions by special Restitution Commissions (in three court instances).

These three laws were supplemented by two additional enactments: the Fifth Restitution Law[74] dealing with properties alienated from legal persons of an economic nature (joint-stock corporation, etc.) which lost their legal personality as a result of acts of persecution, and the Sixth Restitution Law[75] dealing with restitution of patents and industrial rights.

15. *Germany*. As a result of the failure of the Allies to achieve uniform restitution legislation in the whole of Germany,[76] there exist five different restitution enactments: one in each of the four zones and the fifth in Western Berlin. This diversity is one of the greatest anomalies in this field, since alienation was absolutely uniform in the whole German territory and there is no reason for treating the present possessor or the former owner differently just because he happens to live or his property happens to be in a given zone of occupation. The second drawback of this discrepancy is that it creates many unnecessary claims and cases of conflict between the various laws, for instance, when the possessor and the property are in different zones, or when the latter was transported from one to another zone or when the owner had properties in more than one zone. Since the laws were enacted on the basis of "sovereign" discretion by the Military Governors or the local authorities and the Berlin Kommandantura, the conflicting rules are unilateral and no arrangement exists for their coordination.

Another, very important, peculiarity of restitution in Germany is the split in authority. Since the Germans were reluctant to enact proper restitution legislation on their own, the laws were issued by the Western Allies but their application was left (except for the court of the last instance and supervision of the activities of the

[74] June 22, 1949—BGBL, 1949, No. 164. The Fourth Restitution Law deals with restoration of firm names.

[75] June 30, 1949—BGBL, 1949, No. 199.

[76] The only provision enacted by the Four-Power Allied Council in this field is Directive No. 50 on Disposition of Property Having Belonged to Organizations Listed in Control Proclamation No. 2 and Control Council Law No. 2 (Nazi organizations). It provided, *i.a.*, for the return of properties formerly owned by trade unions, cooperatives, political parties, and other democratic organizations.

implementing authorities) to the Germans. The only exception is the Thuringian law mentioned below, enacted and implemented by the Germans themselves.

In all cases discussed above, the alienation (except that subject to restoration in Austria) was considered to have been made by the Germans or other occupants or based on foreign influence or insistence. Germany is the only country where it was the direct responsibility of its own former government (even if illegitimate in the view of the Allies and the present local regime) and of the acquirers. The result should have been much stricter rules of restitution and responsibility for non-restitutable properties. In a sense this is actually the case, at least in so far as the law in the United States Zone is concerned; the laws in the British Zone and in Western Berlin are somewhat less strict and that in the French Zone even less so. The existing scant legislation in the Russian Zone is considerably weaker than in any other region.[77]

Except for the Thuringian restitution law of September 14, 1945, and Military Government Law No. 52 (enacted in the United States Zone immediately following the occupation of Germany and thereafter in the British Zone, which provided for a certain measure of safeguards for alienated property), the only early practical step in the field of restitution was Decree No. 24 of the French Military Government dated December 8, 1945, concerning the declaration of acts of spoliation on grounds of race or opinion.[78] Not until November 19, 1947, were laws promulgated in the United States and in the French zones. That of the latter was largely patterned after the French decree of April 21, 1945, while the United States zonal law proceeded on the thesis of a "wrongful deprivation"; a presumption of such deprivation which cannot be rebutted except in strictly defined instances; a distinction between the claim for restitution and that of avoidance (granted only when the alienation took place after the proclamation of the Nuremberg laws); the right of the claimant to choose between restitution and the payment of the difference; the difference between a strict and mitigated responsibility of the defendant depending on the manner in which he acquired the property. The course of restitution in the British Zone and Western Berlin was somewhat different in that, preliminary to the enactment of restitution laws, temporary orders were issued which provided not only for the obligatory registration of alienated property by the possessor but also for temporary applications by the former owner. The restitution enactments themselves are largely patterned upon the United States zonal law with the exception that the only remedy provided is a claim for restitution, there is no difference between strict and mitigated responsibility of the possessor, etc.

A special case is afforded by the Saar territory, in which the French zonal law

[77] For instance, the right to claim is restricted to near relatives; the owner always has to repay the consideration received; if the possessor refused restitution or the parties cannot agree on the conditions of repayment, a decision is made by a court of arbitration.

For details on restitution in Germany, see the special article on that country in this symposium.

[78] JOURNAL OFFICIEL DU COMMANDEMENT EN CHEF FRANCAIS EN ALLEMAGNE No. 10.

was at first valid but was amended in July, 1949, by a special Saar law denying restitution in transactions made under the so-called Rome Agreement providing for the right of liquidation of Jewish property within a certain period after the Saar plebiscite, if a fair price was paid, except where individual duress was applied.

The main peculiarity of restitution in the Russian Zone (or Eastern Germany, including Eastern Berlin) is that in only one of the Laender of this region—Thuringia—has a restitution law been enacted while in the rest of the territory restitution is granted on the basis of the general provisions of the German Civil Code providing for the annulment of contracts entered into under duress.[79] Court practice seems to recognize that racial persecutees were subjected to "collective coercion," and this coercion is a ground for annulling transactions. However, few cases are known where restitution has actually been effected on this basis.

[79] An exception is afforded by Order No. 82 of the USSR Military Government in Germany dated April 29, 1948, concerning restitution of property confiscated from democratic organizations.

REFUGEES AND REPARATIONS

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To an extent which exceeds any other catastrophe in modern times, the events of 1933-1945, and particularly 1939-1945, destroyed people and created refugees. Mass expropriations and condemnations were accompanied and followed by mass slaughter. The destructiveness of war was more than matched by the ferocities of Buchenwald and Bergen-Belsen.[1] And as the smoke of the gas chambers abated after the German collapse, the outlines of a new and fantastically huge problem in the relief of human misery became apparent.

Systematically and with characteristic attention to the ritualistic niceties of bureaucracy, the Germans under Hitler exterminated about six million Jews in Europe and some numbers of other persecutees, political or religious. The extermination was preceded, accompanied, and followed by a methodical confiscation of property. The device of the communal fine was used.[2] When Nazi riots occurred, it was considered to be appropriate to fine the "non-cooperating elements" who were suspected of hostility toward the regime which demanded their deaths.[3] And steadily, as sums large enough in the absolute sense but in this sense relatively small filled the pockets of individual Nazis, the main stream of persecutee properties went into the ample coffers of the German state. To impoverish the Jew was to enrich the state; and acts of violence thus had their appeal not merely to the sadistic and the cruel, but also to the careful and meticulous bankers and keepers of accounts. Murder thus turned a neat profit for Nazi officials and the Nazi state.

Out of this most brutal fact of modern times there grew a conviction that has found its way into international agreements—that, to at least a small extent, the German state should make some reparation to the victims of Nazidom. This principle has been at the heart of declarations and conferences. But, despite the moral

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[1] Other wars were almost as destructive. See MOORE, INTERNATIONAL LAW AND SOME CURRENT ILLUSIONS 1, 10 (1924): "When the Thirty Years' War . . . opened in 1618, the population of the old German Empire was between 16 and 17 millions; in 1648, when it closed, the population was 4,000,000." But other wars were not accompanied, as in modern times, by a determination to exterminate an entire "race."

[2] *E.g.*, Durchfuehrungsverordnung Ueber die Suehneleistung der Juden (Regulations for administration of the decree imposing an atonement fine on Jewish subjects) of 21 November 1938. [1938] REICHSGESETZBLATT, Part I, 1638.

[3] Thus, the "Decree for the Reconstruction of the Streets at Jewish Concerns," of November 12, 1938, provided that: "All damages which were caused by the indignation of the people about the provocation of international Jewry against National Socialistic Germany . . . have to be repaired immediately by the Jewish owners or tradesmen." (translation) [1938] REICHSGESETZBLATT JAHRGANG, Part I, 1581.

force that lies behind it, the principle has been implemented to a pitifully small extent. One way in which it has been partially implemented has been in connection with German assets lying outside the borders of Germany. The treatment of such German external assets is one of the two subjects of this article. The other subject —the treatment of "heirless assets"—relates to a corollary conviction, the conviction that the property of deceased persecutees who left no heirs can be devoted to no better purpose than the relief and rehabilitation of surviving persecutees. This conviction, too, has had more "sympathetic consideration" than actuality breathed into it.

In the expectation that other articles in this symposium will deal with such subjects as the indemnification and restitution programs, this article is thus limited to the external assets and heirless property problems.

I

GERMAN EXTERNAL ASSETS

From the inception of exchange controls, governments using those controls have regarded the holdings abroad of their own nationals as not entirely different from the property of the government itself. True, most governments listed such assets as the property of the citizen; but the latter's ownership was in fact little more than a right to receive compensation, in local currency, if his government decided it needed the foreign exchange represented by the foreign assets. In any realistic view of the matter there can be little doubt that foreign exchange assets have been regarded, even by non-socialist governments, as private property of a different sort than most private property; and this difference has been reflected in the treatment accorded to the private property of enemy nationals.[4]

Thus the Allied and Associated Powers, after World War I, made it possible for themselves to take over and apply to reparation accounts the property within their territories of German nationals; and the United States, in the Treaty of Berlin, adopted the clauses of the Versailles Treaty applicable to this concept. The German Government was obligated to recompense its citizens for property which they thus lost. Despite argument that this represented a deterioration in if not a violation of international law, the United States used the same concept after World War II; and the Trading with the Enemy Act contains specific provision, adopted in 1948, that German enemy property shall not be returned.[5] Such property is being applied to the war claims of the United States and its nationals.[6]

[4] There is a great deal of literature on this subject, much of which is summarized and discussed in: Somerich, *A Brief against Confiscation;* Rubin, *"Inviolability" of Enemy Private Property;* and Gearhart, *Post-War Prospects for Treatment of Enemy Property,* 11 LAW & CONTEMP. PROB. 152, 166, and 183, respectively (1945). It will be no surprise that the view stated in the text is that of the article by Rubin cited in this note.

[5] Trading with the Enemy Act, §39: "No property or interest therein of Germany, Japan, or any national of either such country . . . shall be returned to former owners thereof . . . and the United States shall not pay compensation for any such property . . . ." 62 STAT. 1246 (1948), 50 U. S. C. App. §2011 (Supp. 1950). Although the Trading with the Enemy Act does not so state, it is contemplated that the national who thus loses his property will be compensated by his own government. *Cf.* Italian Treaty of Peace, Art. 79(3).

[6] War Claims Act of 1948, 62 STAT. 1247 (1948), 50 U. S. C. App. 2012 (Supp. 1950).

Nothing effective was done after World War I with respect to German assets, private or public, in neutral territory.[7] But World War II brought with it the idea that such property ought to be responsive to reparation claims. The Potsdam Agreement thus distributed German external assets between East and West, assigning those assets in Hungary, Bulgaria, and Rumania and in the Soviet Zone of Austria to the USSR, and leaving the others to the Western Allies.[8] And in December 1945, the Paris Conference on Reparation provided, in its Final Act, which went into effect January 14, 1946, that the United States, the United Kingdom, and France, on behalf of the reparation claimant countries, should obtain German assets in the neutral countries.[9] Assets in the Allied countries were to be taken over by those countries and applied to reparation accounts.[10]

Out of German assets in neutral countries, the Paris Conference allocated the sum of $25,000,000[11] to be made available for ". . . large numbers of persons [who] have suffered heavily at the hands of the Nazis and now stand in dire need of aid to promote their rehabilitation but will be unable to claim the assistance of any Government receiving reparation from Germany . . ." ;[12]and it directed five governments (the United States, United Kingdom, France, Czechoslovakia, and Yugoslavia) on behalf of those governments represented in the Inter-Allied Reparation Agency (IARA) to work out a plan, in consultation with the Inter-Governmental Committee on Refugees, to accomplish this end. At a subsequent conference in Paris the five governments agreed upon a plan embodied in an Agreement[13] and in a Letter of Instruction to the Director of the Inter-Governmental Committee on Refugees.[14]

The Five Powers agreed that 90 per cent of the $25,000,000 should be used to rehabilitate and resettle Jewish victims; and that 10 per cent should be utilized to assist non-Jewish victims. All funds were to be used for rehabilitation and resettlement, none for compensation to individual victims. The 90-10 proportion reflected the overwhelming preponderance of Jews among the broad categories of political, racial, or religious persecutees of the Nazis who were unable to claim the assistance of any Government receiving reparation from Germany.[15]

[7] Although the Allied and Associated Powers, at the Versailles Conference, discussed German external assets without apparent distinction between those in Allied and in neutral territory. See memorandum cited in BERNARD M. BARUCH, THE MAKING OF THE ECONOMIC AND REPARATION SECTIONS OF THE TREATY. 338 *et seq.* (1920).

[8] It was understood that the USSR would compensate Poland out of its share; all other claimants would participate in the Western share. Potsdam Accord, Article IV, (2) and (3).

[9] Final Act of the Paris Conference on Reparations (sometimes referred to as Paris Reparation Agreement), Part I, Art. 6(c).

[10] *Id.*, Part I, Art. 6(A).

[11] *Id.*, Part I, Art. 8. The amount is pitifully small in relation to any conceivable measure of compensation. The United States position at the outset of the Paris Conference was for a larger sum.

[12] *Id.*, Preamble to Art. 8.

[13] Agreement on a Plan for Allocation of a Reparation Share to Non-Repatriable Victims of German Action, generally referred to as the Five Power Agreement of June 14, 1946.

[14] Letter of Instruction Transmitted by the Government of France on Behalf of the Signatories to the Five Power Agreement, dated Paris, June 21, 1946, incorporated by reference in the basic Agreement. It is considered an integral part of the Agreement.

[15] Par. A, Five Power Agreement.

To assure speedy implementation of the plan, the Five Power Agreement designated the Inter-Governmental Committee on Refugees and its Director to administer the funds and provided for transfer of functions to the successor United Nations agency and its Director-General;[16] but principal operating responsibility for rehabilitation and resettlement of the victims was placed upon appropriate public or private agencies. The Director of the Inter-Governmental Committee on Refugees, or his successor, was instructed to obtain the $25,000,000 from designated neutral countries when the funds were available,[17] and to make payment of the funds to appropriate operating field agencies after he approved specific plans and projects of such agencies. By placing responsibility for approval of rehabilitation and resettlement schemes upon the Director of the Inter-Governmental Committee on Refugees and his successors, and not upon the organization, the Five Power Agreement anticipated and avoided delay which would otherwise have resulted if agreement of the member governments of the Inter-Governmental Committee on Refugees or its successors had been required on specific rehabilitation and resettlement plans.

Agreement was reached on the Jewish side that two organizations, the Jewish Agency for Palestine and the American Jewish Joint Distribution Committee, would receive and administer the funds pursuant to projects to be approved by the Director of the Inter-Governmental Committee on Refugees or the head of any United Nations successor organization. The Jewish Agency for Palestine was selected because of the belief that a great number of the victims would emigrate to Palestine, and the American Jewish Joint Distribution Committee because it was the largest Jewish field relief and resettlement organization with a program of wide and varied scope in countries other than Palestine. On the non-Jewish side, the Director-General was empowered to select the appropriate field organizations to work on behalf of non-Jewish victims.

The pattern for allocation and administration of funds was thus expeditiously established. But the problem first to be faced was the obtaining of these funds. For the purpose of obtaining German external assets located in neutral countries, therefore, the United States, the United Kingdom, and France, as representatives of IARA, suggested successive conferences with the Governments of Switzerland, Sweden, Portugal, and Spain. These conferences began with Switzerland in the spring of 1946, the invitation having been extended in February of that year. They still, in one form or another, continue so far as Switzerland and Portugal are concerned.

A. Switzerland

Negotiations with a Swiss delegation headed by Minister Walter Stucki were begun in Washington in March of 1946. In May 1946, an agreement was signed.

[16] Administration of the program and funds passed to the Executive Secretary and to the Preparatory Commission for the International Refugee Organization (PCIRO) on July 1, 1947, and subsequently to the Director General and the International Refugee Organization (IRO).

[17] Letter of Instruction, dated December 24, 1946, amending Letter of 21 June 1946.

This was shortly thereafter ratified by the Swiss Parliament. The agreement contained a provision that:

> The Swiss Government undertakes, in recognition of the special circumstances, to permit the three Allied Governments to draw immediately up to 50,000,000 Swiss francs upon the proceeds of liquidation of German property against their share thereof. These advances will be devoted to the rehabilitation and resettlement of non-repatriable victims of German action, through the Inter-Governmental Committee on Refugees.[18]

This provision formalized certain anterior exchanges between the Allies and the Swiss. In a preliminary letter indicating fundamental agreement on the bases of the agreement, the Allies had stated "the satisfaction felt by their Governments that it will be the intention of the Swiss Government, in recognition of the special circumstances, to permit the three Governments to draw advances in order that these advances will be devoted through the Inter-Governmental Committee on Refugees to the rehabilitation and relief of non-repatriable victims of German action."[19] The Swiss responded that they were prepared, "as soon as the Accord comes into force, to make certain advances. . . . The amount of these advances and the method of payment remain to be fixed."[20]

Under these circumstances, it was a not unreasonable hope that the funds in question would have been paid to the IRO shortly after the signing of the Accord. This was, unfortunately, not the case. Disputes between the Allies and the Swiss, on non-refugee matters, have held up execution of the Accord. In view of the delay being encountered, the Allies, in 1947 and 1948, requested an advance payment for IRO purposes from the Swiss Government. These requests, in the amount of 20,000,000 Swiss francs, were paid in July 1948, after the Allied requests had been supplemented by an urgent appeal from the Executive Director of the PCIRO.[21]

In 1950, further Allied requests for an advance in the amount of some 17,000,000 Swiss francs were made. These requests, again, were supplemented by a request of the Executive Director of the IRO. Although the Allied requests were rejected,[22] answer to the IRO request was delayed. There now appears to be substantial hope that this payment will be made shortly.

Although meetings which were held in Bern in the summer of 1950 apparently broke up even before they were well under way, under circumstances which seemed the opposite of amicable,[23] the latest negotiations on the Accord seem to have taken a different course. Reports indicate that the Allies and the Swiss, at long last, have

[18] Annex to Swiss-Allied Accord, Art. V.

[19] Letter, Randolph Paul, Special Assistant to the President, to Dr. Walter Stucki, Chief of Swiss Delegation, May 21, 1946.

[20] Letter, Stucki to Paul, May 22, 1946.

[21] INTERIM PROGRESS REPORT OF DIRECTOR GENERAL, IRO, FOR PERIOD JULY 1, 1947—SEPTEMBER 30, 1948, 8-9; Rapport du Conseil federal a l'Assemblee federal sur l'execution de l'accord conclu a Washington la 25 Mai 1946 (du 13 Avril 1949) p. 10-11; IRO Press Release No. 334, July 24, 1948.

[22] Letter of Assistant Secretary of State McFall, dated May 9, 1950, in *Hearings before Sub-Committee of Committee on Interstate and Foreign Commerce on S. 603*, 81st Cong., 2d Sess. 195-196 (1950).

[23] N. Y. Times, July 2, 1950 (dispatch dated July 1, 1950).

composed their fundamental differences in connection with the Accord.[24] If these reports turn out to be accurate, as they seem to be, the payment of the added 17,000,000 Swiss francs should follow shortly after that composition of difficulties. In that event, all payments due under the Swiss Accord will have been made. Although it is regrettable, from the point of view at any rate of the refugees, that delay has occurred in this entire program, credit must be given to the Swiss Government for its willingness to make the not inconsiderable sum of 20,000,000 Swiss francs available to IRO, at a time when the entire fate of the Accord was in considerable doubt.

B. Sweden

A Swedish-Allied Accord was negotiated and signed in Washington in July of 1946. It contained a clause providing:

> The Swedish Government will make available 50 million kronor to the Inter-Governmental Committee on Refugees for use in rehabilitation and resettlement of non-repatriable victims of German action.[25]

It was also stated that the Swedish Government, "while reserving its decision as to the manner in which the funds will be made available, will use its best efforts to make the funds available as soon as possible and in such manner as to best carry out the aims of the Committee."[26]

This provision of the Swedish-Allied Accord was promptly carried out, despite a dispute, since settled, between Sweden and the Allies over distribution of other sums to IARA members as reparations. The PCIRO, which had succeeded the Inter-Governmental Committee on Refugees on July 1, 1947, received a deposit of 50,000,000 kronor (then approximately $12,500,000) in that same month.[27] Despite Sweden's exchange stringencies, a very considerable portion of these funds was made transferable into sterling[28] and other currencies and was used for the rehabilitation, transportation, and resettlement of refugees. Although a small portion of these sums available for non-Jewish victims is still on deposit in Sweden awaiting conversion to other currencies, the Swedish Government did promptly carry out its commitments under the Accord, despite the existence of unresolved issues on other points; and if the maxim that he who gives quickly gives twice is ever relevant, it is surely relevant here.

C. Portugal

So much cannot be said for the Portuguese attitude. Negotiations with Portugal

[24] N. Y. Times, March 26, 1951 (dispatch dated March 25, 1951). Fuller reports are contained in several Swiss newspapers. See Gazette de Lausanne, March 20, 1951; Neue Zürcher Zeitung, March 20, 1945; Journal de Geneve, March 20, 1945.

[25] Letter, Justice Emil Sandström, Chief, Swedish Delegation, to Chiefs of Allied Delegations, July 18, 1946.

[26] *Ibid.*

[27] PCIRO resolution PREP/111; PCIRO Press Release No. 255, July 23, 1947. This marked the first receipt of funds under the refugee-reparation program.

[28] To the extent of £1,500,000. See PCIRO Press Release No. 681, January 30, 1948.

were begun in the fall of 1946. An Accord on the subject of German assets in Portugal was eventually signed in the following February. Article V of the Accord contained a provision that allocation of the proceeds of German assets would be made: "In the first place, the sum of escudos 100 million for assistance to the non-repatriable victims of German aggression."[29] But the charges of the Allies that Portugal had received gold looted by Germany from occupied areas have not yet been settled; and the Portuguese have delayed implementation of even those provisions of the Accord which provide assistance to refugees. This delay is despite the existence of liquid German assets almost double the refugee-allocated 100 million escudos; and despite the fact that these sums allocated to refugee needs are in any case given a firm priority under the Accord, so that it is hard to see what dangers could inhere in allowing payment to the International Refugee Organization. The status of these 100 million escudos (at present rates of exchange about $3,300,000) remains in a curious limbo of stalemate. However, negotiations continue, and, as in the Swiss case, there is some reason to hope that a reconciliation of views can be achieved which will permit implementation of the Accord on German assets.

D. Spain

An agreement on German assets was reached between the Allies and the Spanish in May 1948. It contained no provision for allocation of funds to refugee relief, largely because (1) it had been believed that the Swiss, Swedish, and Portuguese Accords would, by that time, have produced the full $25,000,000 promised under the Paris Reparation Agreement; and (2) the Spanish peseta was not considered to be a currency which could be usefully employed by the International Refugee Organizations or the private agencies operating in the refugee field.

* * *

Thus, out of the $25,000,000 allocated to refugee purposes under the Paris Reparation Agreement of January 1946, the following is the situation.

1. *Switzerland.* About $5,000,000 paid in 1948 in response to Allied and International Refugee Organization appeals. An Allied request for an additional $3,200,000 has been rejected, but an International Refugee Organization request is still pending.

2. *Sweden.* Payment of all sums due, amounting to about $12,500,000, were promptly made in 1947.

3. *Portugal.* About $3,000,000 is allocated under the Allied-Portuguese Accord, signed in 1947, as a priority item. Payment awaits the outcome of negotiations still going forward, or Portuguese consent to payment immediately.

Thus, of the $25,000,000 allocated in 1946, about $7,500,000 remains, at the end of 1950, still unpaid. It would seem not inappropriate for the Swiss and Portuguese Governments, in recognition of what was urgent in 1946 and is even more urgent

[29] The Accord has as yet not been published, though portions of it have been fully disclosed to and discussed with interested persons.

now that refugee resettlement programs must be wound up, to release the indicated sums without making such release dependent on settlement of issues in which refugees have no interest, can exercise no control, and for the existence of which they are not responsible.

E. Italy

One unexpected source of funds for refugee-reparations purposes has developed. The Paris Reparation Agreement said nothing about German assets in Italy—neither a neutral nor an Allied country. As a result, the Italian Treaty of Peace provided that "Italy agrees to take all necessary measures to facilitate such transfer of German assets in Italy as may be determined by those of the Powers occupying Germany which are empowered to dispose of the said assets."[30] These Powers were, under the Potsdam Agreement, the United States, United Kingdom, and France.

In the fall of 1948, the suggestion was made to the United States on behalf of the American Jewish Committee that some share of the German assets in Italy be used for a contribution to the reparation fund of the International Refugee Organization. Although no international agreement calling for such a contribution existed, it was suggested that it would be an appropriate disposition of a part of the German assets in Italy—the more so since it was understood that the United States proposed to renounce its share of such assets.

Negotiations between representatives of the three powers and of the International Refugee Organization culminated, in December 1950, in agreement between the interested Powers, and in a letter addressed to the International Refugee Organization stating that 500,000,000 lire would be turned over to the International Refugee Organization reparations fund. Without the strong initiative of the United States, this step would not have been taken. It is heartening to find a decision of governments, based, particularly today, solely on humanitarian motives. The moral might well be pertinent to the pending Portuguese discussions.

II

NON-MONETARY GOLD; HEIRLESS ASSETS

Article 8, Part I of the Paris Reparation Agreement provided three bases for funds for refugee assistance: one was the $25,000,000 fund already discussed; the others were "non-monetary gold" and "heirless assets" in neutral countries.

These categories of property, strictly, cannot be classified as reparations. "Non-monetary gold" is looted property—wedding rings, gold teeth, silver plate, and the like. Heirless assets are those which had belonged to persons who, with their entire families, were exterminated by the Nazis. Both kinds of property, thus, unlike German external assets, derived from the victims themselves. It is difficult to designate as "reparations" the proceeds of property of the Nazi victims. Nevertheless, since the non-monetary gold and heirless assets problems are linked with the

[30] Art. 77(5).

general program of assistance to victims of the Nazis, these subjects can be discussed here.[31]

A. Non-monetary Gold

The Paris Reparation Agreement provided that "A share of reparation consisting of all the non-monetary gold found by the Allied Armed Forces in Germany . . . shall be allocated for the rehabilitation and resettlement of non-repatriable victims of German action."[32]

By early agreement between representatives of the Inter-Governmental Committee on Refugees and the United States, it was agreed that "non-monetary gold" should include "all valuable personal property which represents loot seized or obtained under duress from political, racial or religious victims of Nazi Government or its satellite governments or nationals thereof. . . ."[33] If this property was such that it could not be restituted because determination of individual ownership was impractical, it was, both in *Germany and Austria,* made subject to the directive addressed in November 1946, to the United States Army commands in Germany and Austria.[34] The British and French apparently accepted a similar definition of non-monetary gold, but refused to expand the scope of the agreement into Austria. The reluctance of the British and French on this score turned out to be largely irrelevant, in any case; by the end of 1950 the British had not turned over any "non-monetary gold" to the Inter-Governmental Committee on Refugees or to the International Refugee Organization, and the French transferred non-monetary gold of a total value of less than $200.00. Although there were semi-official reports from time to time that such property had been found and would be made available in the British Zone of Germany, no transfer, as of the end of 1950, had been made. The Armed Forces of the United States, on the other hand, have located considerable quantities of such property in their zones of occupation and have promptly turned these properties over to the Inter-Governmental Committee on Refugees and to the International Refugee Organization.[35]

The United States authorities collected a vast array of Nazi loot at the Foreign Exchange Depository established at Frankfurt. It ranged from jewelry and silverplate to bag after bag of gold teeth. A similarly grim array was collected at Salzburg. IRO and Army personnel then made a joint inventory. A good part of the material was found to be best disposed of by smelting, refining, and selling it in bar form.[36] The balance—rugs, diamonds, silverplate, jewelry, and the like—was shipped to the United States on International Refugee Organization vessels and was

[31] See Howard, *The Paris Agreement on Reparation from Germany,* DEP'T STATE PUBLICATION No. 2584, at p. 5 (1946).

[32] Part I, Art. 8(A).

[33] Joint Chiefs of Staff Directive addressed to Commanding Generals, United States Forces, Austria, in November 1946. Reprinted in INTERIM PROGRESS REPORT OF DIRECTOR GENERAL OF THE INTERNATIONAL REFUGEE ORGANIZATION, FOR PERIOD JULY 1, 1947-SEPTEMBER 30, 1948.

[34] *Ibid.*

[35] See PCIRO Resolution PREP/134, October 1947.

[36] See PCIRO Press Release No. 715, February 11, 1948.

disposed of at auction sales. This project would have been entirely impractical had it not been for the efforts of a group of New York businessmen, headed by Colonel Ray C. Kramer, who volunteered their services in a "Merchandising Advisory Committee" and who assisted IRO personnel in best disposing of these objects.[37] Through all of these efforts, over $3,000,000 was realized from "non-monetary gold" proceeds.[38]

Agreement with respect to non-monetary gold did not extend outside of Germany. But there was a similar cache of property in Italy. This property had been captured by the American Fifth Army from one of the German armies in Italy. It was stored in the vaults of the Bank of Italy in Rome under joint custodianship of the American and British Embassies in Rome. After long negotiations between the United States and British authorities and the International Refugee Organization, in consultation with the American Jewish Committee, it was agreed that this property would be turned over to the reparations division of the International Refugee Organization; that it would be liquidated by the International Refugee Organization; and that half of the proceeds would be turned over by the International Refugee Organization to Italy for use in the relief of Italian war orphans, while the other half would be retained by the International Refugee Organization for the benefit of non-repatriable victims of German action.[39] It is expected that the value of these properties will be in the neighborhood of $250,000.

B. Heirless Assets

The Paris Reparation Agreement provided: "Governments of neutral countries shall be requested to make available for this purpose [rehabilitation and resettlement of non-repatriable victims of German action] (in addition to the sum of 25 million dollars) assets in such countries of victims of Nazi action who have since died and left no heirs."[40] Pursuant to this directive, the Allies, in negotiating on German property questions with the neutrals, attempted to obtain commitments with regard to the disposal of heirless assets. The International Refugee Organization has also, from time to time, called upon the neutrals to take appropriate action.[41] Although sympathetic interest was shown in all cases, until now the results have been negative.

1.

The principal probable location of heirless assets in neutral countries is Switzerland. The amounts of that type of property in any one place is a fact very difficult to determine. That an asset is heirless is not always known to its custodian. In

[37] ANNUAL PROGRESS REPORT, DIRECTOR GENERAL, IRO 64 (July 1, 1949-June 30, 1950).

[38] INTERIM REPORT, *op. cit. supra* note 33, at 9 *et seq.*

[39] The terms of this settlement were confirmed in Washington in November 1950, by exchange of correspondence between the Department of State and the British Embassy, and the Director General of the International Refugee Organization.

[40] Part I, Art. 8(C).

[41] INTERIM PROGRESS REPORT, *op. cit. supra* note 33, at 15; Report of the Executive Secretary (PCIRO) on the Status of the Organization and its Activities during the First Three Months, Document PREP/130, October 1947; PCIRO Resolution PREP/112, July 1947.

many cases, funds had been deposited in Switzerland by clients of the Swiss banks with the understanding that such funds would remain safe and undisturbed until their proprietors were able to or found it necessary to appear to claim them. Funds were deposited in Switzerland—as they were in the United States—in order to avoid taxes, or in order to provide "flight capital" in case of the kind of emergency which the troubled years after the First World War threatened at any time, or for a variety of other personal reasons. Funds were often deposited in secret and numbered accounts, or held in the name of a Swiss proxy. It was far from unusual, in such cases, for these accounts to remain undisturbed for a period of years. All of these elements enter into the difficulties of determining what are in fact heirless assets, and baffle attempts to forecast—and sometimes to ascertain—the amounts of such assets.

Partially because of these uncertainties, negotiations on the subject of heirless assets have been particularly difficult. The Allies first entered into such negotiations with the Swiss; but the Swiss-Allied Accord of 1946 contained no definite statement with respect to heirless assets. Instead, a letter was directed to the Allies by the Chief of the Swiss Delegation, in which it was stated that "my Government will examine sympathetically the question of seeking means whereby they might put at the disposal of the three Allied Governments, for the purposes of relief and rehabilitation, the proceeds of property found in Switzerland which belonged to victims of recent acts of violence of the late Government of Germany, who have died without heirs."[42]

Negotiations with the Swiss Government on the subject of heirless assets have been carried on intermittently since 1946 by interested private organizations, by the Swiss Jewish community,[43] and by the Allied Governments. Proposals have been placed before the Swiss to the effect that legislation be enacted which would place heirless property at the disposal of a Jewish restitution successor organization, or some similar organization which could use its proceeds for assistance to surviving persecutees. With the assurance of the benevolent support of the Allies, representatives of interested Jewish organizations met with the Swiss authorities, headed by the Swiss Minister of Justice in early July, 1949. Although the meeting came only after a considerable exchange of correspondence and views, it was devoted largely to a review of the legal problems and difficulties. Chief among these were the problems of penetrating the curtain of the Swiss banking secrecy laws in a manner which would enable one to identify heirless property; and the question of whether Switzerland, as the country in which the heirless assets were located, had the right to dispose of such assets, or whether the country to which the decedent had owed allegiance had that right. Since no question existed—by definition—of a fiduciary duty owed to a living client or his heirs or claimants, it was thought by the interested organizations that techniques could be devised to overcome the banking

[42] Letter of May 25, 1946.

[43] RAPPORT ANNUEL DE LA FEDERATION SUISSE DES COMMUNAUTES ISRAELITES POUR L'ANNEE 1949 23-24.

secrecy obstacle. Moreover, it was felt that there was sufficient precedent in international law and practice for the taking of jurisdiction by the state in which the property was located rather than the state of the decedent's nationality.[44]

Although it was agreed in the July meeting that legal materials, including copies of the laws enacted in the United States Zone of Germany and proposed in the Congress of the United States, would be furnished, the enthusiasm of the interested organizations suffered a severe blow by the discovery that an agreement had been reached between Switzerland and Poland shortly before the July 1949 meeting, included in which was a "secret" provision effectively disposing of heirless assets in Switzerland of Polish origin. The general outlines of the agreement were of a somewhat familiar pattern: a trade and compensation agreement, under which the proceeds of trade were to be partially used to compensate Switzerland for expropriations in Poland of the property of Swiss nationals. What was novel in the agreement were the provisions to the effect that unclaimed property of Polish origin, remaining unclaimed for a five year period, would be consolidated in an account which would be made available to the Polish authorities. It thus appeared that the legal difficulties arising out of banking secrecy requirements had been successfully surmounted; and that the jurisdictional aspects of the problem had been circumvented by an agreement which seemed to recognize Polish rights with respect to the unclaimed property of Polish nationals, while at the same time cooperation in making such property available was used as a partial *quid pro* an agreement on compensation for the expropriation of Swiss property in Poland.[45] The Polish-Swiss agreement was ratified over the opposition of an appreciable minority of the Swiss Parliament.

Subsequent negotiations in Switzerland have been directed toward two objectives: the confining of the Polish precedent to its own facts, so that heirless assets of other than Polish origin might nevertheless be disposed of in a manner consistent with the needs of the survivors of that class of persecutees whose slaughter created the problem of heirlessness;[46] and the working out of procedures which would make it possible for claimants, whose possession of supporting facts or documents was necessarily scanty, to lay claims to properties which might otherwise be classified as heirless. In neither of these directions have developments to the date of writing been particularly encouraging. At the very least, since an extraordinary situation is recognized in the Swiss-Polish agreement, it would seem appropriate for some steps to be taken by the Swiss Government and the Swiss banking and insurance authori-

[44] Although published records with respect to these matters do not exist, numerous private exchanges of letters confirm these facts.

[45] The RAPPORT ANNUEL, *supra*, note 43, states that representations were made to the Swiss Federal Council declaring that its manner of proceeding in this connection had been "une surprise et une deception," *Id.* at 23.

[46] It is understood that a Swiss-Hungarian agreement, the details of which are not available, may have been reached.

ties to assist putative claimants in the establishment of the facts on which their claims can be proved or disproved.[47]

2.

Some discussions between the interested charitable organizations and the authorities of other neutral countries have taken place, though such talks were not pressed pending the outcome of the much more important Swiss negotiations. In other countries the amounts of heirless property were estimated not to be substantial. There is probably some property of this sort in Sweden, but it is undoubtedly insignificant in comparison to the amounts involved in Switzerland. Although some sympathetic interest has been shown by the Swedish authorities,[48] the undoubted complexities of the problem and the smallness of the sums at issue have combined to produce no affirmative action.

3.

The most advanced and complete treatment of the heirless property problem exists in the United States Zone of Germany. There the occupation authorities, both OMGUS and HICOG, have shown an extraordinary amount of sensitivity to the general problem of restitution and of its corollary where a claimant does not exist. Military Government Law No. 59, since emulated in the British Zone, set up procedures for the recovery of properties taken from persecutees under duress. Under the Law and its regulations, provision was made for successor organizations competent to process restitution claims in the all-too-common situation where no claimant existed.[49] The Jewish Restitution Successor Organization, a corporation

[47] Private lawyers have suggested to the Swiss Government that extraordinary measures be adopted to assist claimants in locating property as to which all records in their possession or possession of their families may have been destroyed. The Swiss Government has replied that this is a task for the Swiss Bankers Association or, in the case of insurance policies, for the Swiss Union of Life Insurance Companies. (Letter of Swiss Legation in Washington to S. J. Rubin, May 26, 1950). Inquiries were thereafter directed to these two associations. The Swiss Bankers Association, under date of June 7, 1950, replied and stated that it would be glad to help "within the limits of possibility," but that first the claimant would have to:

1. prove "on the basis of official and authenticated documents" the death of the original owner;
2. establish, on the same basis, claimant's right of succession; and
3. give exact details about the banks in which the accounts exist.

It is, of course, obvious that these requirements cannot be met. The typical situation is one in which death must be presumed from disappearance at Buchenwald or other concentration camp; in which documents were lost or destroyed in the general holocaust; and in which knowledge of the location of the account is lacking. Were the prerequisites stated by the Swiss Bankers' Association present, there would, of course, be no need for the assistance of the Association. And the attitude of the Association seems to ignore both the interests of deceased clients and their heirs and the fact of extraordinary occurrences between 1933-1945. This attitude has now been confirmed to the American Legation in Bern.

The Union of Swiss Life Insurance Companies, on the other hand, replied (Letter to S. J. Rubin, dated June 19, 1950) to the effect that it had requested all of its members to make an investigation, which, in the case at hand, had turned out to be negative. The attitude of this Association was thus more cooperative—and realistic—than that of the Swiss Bankers' Association, and might well commend itself to the latter.

[48] The Swedish-Allied Accord of 1946 included a letter from Justice Sandström, Chief of the Swedish Delegation, confirming his agreement to recommend favorable action *re* heirless property to his Government.

[49] Art. 13, M. G. Law No. 59.

having its seat in New York, was organized by various Jewish charitable organizations and was recognized by the occupation authorities.[50] It has processed in Germany many thousands of claims, and has recovered many properties. The problem is nevertheless of enormous magnitude; and the processing of individual claims has presented the JRSO with administrative problems which seem likely to continue for years. Under these circumstances, and in view of many other compelling factors—the growing unpopularity of restitution in Germany, the immediate need for funds—negotiations have been begun, with the benevolent concurrence of HICOG, looking toward bulk settlements with the various German laender. It is to be hoped that these negotiations will be successful.[51] If they are, the Jewish Restitution Successsor Organization will be able to wind up its affairs within a reasonable period of time, to turn over the proceeds of its efforts to the designated operating agencies, and to leave the ultimate adjustments to the German laender authorities themselves. The rectification of the evils of the Hitler regime is a fundamental Allied policy; but it is a policy which is best implemented by being quickly implemented, and bulk sum settlements, gross though they may be, are the best instrument for the solution of the political problems which arise out of the operations of the Jewish Restitution Successor Organization in Germany five years after the end of active hostilities and out of the immediate and pressing needs of surviving persecutees.

Encouraging steps have also been taken in the British Zone of Germany, where the program is essentially similar to that in the American Zone, but is about two years later in inception. There, a successor trust company for heirless assets began to function only in the fall of 1950. Progress should, however, be rapid, since a pattern of operation will have been set by the Jewish Restitution Successor Organization. Action in the French Zone, though promised, is still not at hand. A restitution law has been also enacted in the Western Sectors of Berlin and the JRSO there recognized.

4.

Agreed sections of the draft treaty of peace with Austria recognize the principle of a successor organization to deal with and press claims to heirless property.[52] Again, negotiations have long been under way with the Austrian Government for measures which might put this principle into effect now, and in advance of the attainment of what seems to be the will-of-the-wisp of a finalized Austrian treaty. Restitution to individual claimants is already part of Austrian law;[53] but the heirless property problem has not been dealt with by the Austrians in any comprehensive way. Draft proposals have been submitted by interested organizations to the Austrians, but no Austrian legislative action has been taken. The major

[50] Regulation No. 3 under M. G. Law No. 59 and appointment thereunder—June 23, 1948.

[51] An agreement has been reached with Hesse.

[52] It is understood that these are Articles 44 and 57 of the draft treaty.

[53] Although a revision proposed in the fall of 1950 would have effectively killed restitution. These revisions were withdrawn, as was explained by Chancellor Figl to the Parliament, as a result of American objection.

achievement to date has been the advance of 5,000,000 Austrian schillings, an advance which was based on the security of the heirless property which was anticipated. Negotiations for an additional advance of 25,000,000 schillings reached a promising state in early 1950; but the promise of these negotiations has not so far been fulfilled.

A small advance on the security of heirless property has also been made in Greece.

5.

Outside of the American Zone of Germany (and the degree to which measures there have been emulated in other Zones), the most comprehensive legislative proposals with respect to heirless property have been advanced in the Congress of the United States. It is particularly unfortunate that these proposals have come to the brink of enactment, only to fail in the Eighty-first Congress at the very edge of success.

Bills were introduced in both the Senate and the House, in both the Eightieth and Eighty-first Congresses, and with bi-partisan support, for the disposition of heirless property found in the United States to successor organizations for relief and rehabilitation purposes. The Senate passed the bill in the Eightieth Congress; it failed of passage in the House. In the Eighty-first Congress, substantially identical bills were introduced in the Senate by Senators Taft and McGrath; in the House, by Congressmen Wolverton and Crosser, the ranking minority member and Chairman of the Interstate and Foreign Commerce Committee, which had jurisdiction over the matter. The Senate passed the bill[54] on the consent calendar in the first session of the Congress, after a favorable report by the Judiciary Committee. During the second session, hearings were held by the Beckworth Subcommittee of the House of the Interstate and Foreign Commerce Committee.[55] A favorable report was submitted and approved by the full Committee;[56] and the bill (S. 603) came up on the consent calendar of the House. It was there objected to,[57] and, unanimous consent failing, went to the Rules Committee. Although that Committee held hearings before the summer recess of 1950, the bill was not granted a rule, and did not come up for consideration on the floor of the House and therefore died pending introduction in the Eighty-second Congress.

The bi-partisan support—and the caliber of that support—which the heirless property legislation has enjoyed, and the subscription to its principles on the part even of those proposing amendments make it practically certain that the bill would be passed if it were to be considered, and make the death of the bill with the expiration of the Eighty-first Congress all the more disappointing. The bill itself is a simple one. Essentially, it provides that property which had belonged to persecutees, as

[54] Although there have been several slightly different versions, the fundamentals of all of the bills are contained in S. 603, 81st Cong., 2d Sess. (1950).

[55] *Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce on S. 603*, 81st Cong., 2d Sess., *inter alia*, 149 *et seq.* (1950).

[56] H. R. REP. No. 2338, 81st Cong. 2d Sess. (1950).

[57] 96 Cong. Rec. 10571 (July 17, 1950).

defined in subsections (c) and (d) of section 32 of the Trading with the Enemy Act, shall be subject to return to a successor organization after the lapse of two years from the time of vesting. In general, the enactment rests on the principle already found in the Trading with the Enemy Act—that the vested property of persecutes should be returned to them. Here, the vested property of persecutees who died heirless is used for the relief of survivors of the same class. Charitable organizations may ask to be designated by the President as successor organizations. If so designated, they may file claims with the Office of Alien Property of the Department of Justice, and may recover heirless property which belonged to persons of like nature to those on whose behalf they propose to act. Since the great part of heirless property, in the United States as elsewhere, is Jewish in origin, it is to be anticipated that the major organization operating in this field will be the Jewish Restitution Successor Organization—which, as mentioned, has already been accredited in Germany. The burden will be on that organization, or, for that matter, any similar organization, to establish its right to claim particular assets: the Jewish organization will have to demonstrate—it is to be hoped under fairly flexible requirements of proof—that the decedent whose property is claimed was in fact Jewish. A limitation of $3,000,000 is imposed on returns to successor organizations. In practice, this probably means little since, although there well may be heirless property in excess of that amount in the United States, it is extremely unlikely that claims to that amount can be substantiated. The limit was imposed primarily to close off the open-end nature of the legislation, so that estimates of the amounts necessary and available for other aspects of the war claims program, and particularly for the legislation now administered by the War Claims Commission, could be established.[58]

It is regrettable that a bill supported by the Administration, enjoying strong bi-partisan support, and, it may be added, which has the added attraction of being meritorious, should fail of passage because of the unwillingness of the Rules Committee to discharge it for full House debate. It is to be hoped, however, that the Eighty-second Congress will enact the legislation which has twice come so close to passage.

6.

A variety of miscellaneous problems cut across the heirless property field. What is to be the status of heirless property in such countries as the Netherlands, for example? There, some discussions have taken place between representatives of interested Jewish organizations and Dutch authorities, with some accent on the question of whether such assets, once recovered, would be available for relief purposes outside of the Netherlands or would be reserved for general use in Holland, or for the use of the remnants in Holland of the once-strong Jewish community there. Other aspects of the problem affect heirless properties in the United States which were owned by nationals of Allied countries. Should such properties be

[58] H. R. REP. No. 2338, *supra* note 56, at 3-4.

returned to the governments of those Allied countries, or be treated like other heirless property in the United States? If they are to be returned, should such governments be free to utilize them as they see fit? Should a condition of turning the properties over be that they be used for relief purposes? Should a requirement be made that Jewish heirless properties be used for Jewish relief? And so on.

Another problem arises in connection with the non-vested heirless assets in the United States. How should heirless property be treated which is blocked but not vested? Senate Bill No. 603 deals only with vested assets. Should the Office of Alien Property undertake to vest all such assets, in order to bring them within the purview of S. 603 or some similar legislation? How is the Office of Alien Property to select such property for vesting, when in the main it consists of assets previously owned by nationals of the Iron Curtain countries, and no general policy of vesting assets of Iron Curtain countries, has—so far—been adopted? And even if the vesting program is extended to Iron Curtain assets in general, with special return provisions to successor organizations applicable to heirless property, what about heirless property in the United States which belonged to nationals of previously Allied countries like Poland—which may well have a status somewhat different from such countries as the Netherlands?

Solutions, in a number of these cases, can be worked out. It has been suggested, for example, that heirless property in the United States of Dutch origin be treated as follows: that it be vested by the Dutch, in a decree which would be recognized formally by the State Department; that it then be unblocked; after which it could (in all probability) be recovered by the Dutch authorities; and that an overall agreement be worked out in advance under which property so recovered would be used for relief purposes, in a proportion to be determined, within and outside of the Netherlands. But the solution to almost any of these aspects of the general heirless property problem is a complicated matter; and it hardly seems worth while—particularly to government officials harassed by other and more immediate problems—to give much attention to questions such as these while the fundamental problem remains in the limbo of Congressional inaction.

III

In the context of a world but lately at war, and with the clouds of a threatened general war hovering overhead, the problems of refugees and resettlement are generally overshadowed. What can be done is pitifully small in terms of what damage remains to be repaired, and what losses are irreparable. But in a picture whose pervading color is dark, there is some light. The measure of the actions taken by individuals and by states is not entirely a material one. The aid that can be given is small in proportion to the problem. But that not only individuals but also states are willing to take action based on humanitarian grounds, and to recognize more than a material basis for their policies, is a note of encouragement.

From first to last, the attitude of the United States and its officials has been a

sign post of hope in a rather bleak landscape. The United States was foremost in sponsoring the claims of refugees at the Paris Reparation Conference. It has taken the initiative on many occasions when inaction would have been easier—and would have been the course of a more cynical bureaucracy. Sweden, too, has been impelled by a high moral spirit, as was Switzerland in making its first advance.

But more remains to be done. The question of Portuguese advances is still pending, though that of the Swiss advance is close to settlement. Heirless property continues to present an open question, in the United States no less than elsewhere. The time for action in favor of the refugees was yesterday, and the day before. But the opportunity is not lost. The grim problems of resettlement and rehabilitation remain, and are the more pressing as new dangers threaten. Time was; time is; hopefully, action will occur before time vanishes into the dust of the past and of resolutions unfulfilled.

RELATIONSHIP OF VESTED ASSETS TO WAR CLAIMS

MALCOLM S. MASON*

During the period of hostilities between the United States and Germany, property in the United States in which there were German interests was blocked or taken under supervision or vested. The act of vesting constituted a transfer of title from the former owner to the United States.[1] The ultimate disposition of such vested property, however, remained in doubt for some time. Early in the war it was argued, for example, by John Foster Dulles[2] that title was taken only as a precautionary measure for the duration of the war. Other authorities argued that the ultimate disposition remained for the Congress to determine, and urged on grounds of assertedly established principles of international law and of policy and expediency that no confiscation of such property should occur.

This problem had arisen in very similar terms during and after World War I. German property in the United States was then seized and held for ultimate disposition as the Congress might direct.[3] The Alien Property Custodian originally conceived of himself as a trustee.[4] Later he became persuaded that the property should be forever removed from the control of the former enemies who had held it, and he undertook a campaign of Americanization by sale to American interests of vested property.[5] With respect to the proceeds of such sales, that which had been the property of the German government itself or of the German ruling family was retained on account of war claims.[6] Substantial portions of the proceeds of the vesting of private German property were made returnable by postwar legislation.[7] The remainder served as security for the payment of certain war claims of American nationals against Germany.[8] In 1934, when it became clear that Germany would

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[1] Cummings v. Deutsche Bank, 300 U. S. 115, 120-121 (1937); United States v. The Antoinetta, 153 F.2d 138 (3d Cir. 1945), *cert. denied*, 328 U. S. 863 (1946).

[2] *The Vesting Powers of the Alien Property Custodian*, 28 CORNELL L. Q. 245 (1943).

[3] Section 12, Trading With the Enemy Act, 40 STAT. 460 (1918), 50 U. S. C. App. §12 (1946).

[4] See REPORT OF ALIEN PROPERTY CUSTODIAN 2-3 (H. R. DOC. No. 840, 65th Cong., 2d Sess.) (January 18, 1918); REPORT OF ALIEN PROPERTY CUSTODIAN 9 (S. DOC. No. 435, 65th Cong., 3d Sess.) (March 1, 1919).

[5] REPORT OF ALIEN PROPERTY CUSTODIAN 15, 239 (March 1, 1919); Section 12, Trading with the Enemy Act, as amended March 28, 1918, 40 STAT. 60, 50 U. S. C. App. §12 (1946).

[6] Section 25(d), Trading with the Enemy Act, added by Settlement of War Claims Act of 1928, 45 STAT. 268 (1928), 50 U. S. C. App. §25(d) (1946).

[7] Section 9(b), especially 9(b)(9), (10), (12), (13), (14), and (16), 9(h), 9(j), 9(m).

[8] Settlement of War Claims Act of 1928, Sections 2(a), 2(b), 2(d), 4, and 10, 45 STAT. 254, 260, 268.

not honor these war claims, further returns were cut off by Public Resolution Number 53, Seventy-Third Congress, subject to certain exceptions which the President might make and which have been narrowly defined in favor of persons having a non-hostile character.[9]

The right to retain German property as security for war claims was expressly provided in the Treaty of Berlin ending World War I between the United States and Germany. These provisions are also found in the Treaty of Versailles.[10]

In World War II, the question of the ultimate disposition of vested assets broke out afresh. The opposing points of view are perhaps most persuasively stated in a symposium appearing in *Law and Contemporary Problems,* Winter-Spring 1945. Several outstanding authorities had argued that confiscation of enemy property would be morally wrong, inconsistent with traditional international law precedents and with established American policy, and would be inexpedient. This point of view is eloquently stated and the authorities supporting it are gathered in Otto C. Sommerich's "A Brief Against Confiscation."[11] The opposing point of view is cogently set forth in Seymour J. Rubin's "'Inviolability' of Enemy Private Property."[12] Mr. Rubin's article concludes:

> It is suggested that the answer is clear and that the conclusion is compelling that enemy property assets should, not only for reasons of expediency, but also for reasons of justice, be utilized for the payment or the securing of the enemy's reparation or similar debts.

The debate was closed by an article by Congressman Gearheart, "Post-War Prospects for Treatment of Enemy Property,"[13] advocating a program for the disposition of enemy alien assets broadly following Mr. Rubin's suggestions. This program set the general pattern followed by legislation later enacted.

External investments are no longer private property. A country uses its nationals' external investments as an instrument of national policy and as part of its national foreign exchange resources. At the most, the nominal holding of external investments is tolerated at sufferance as a deliberate and watchful decision of policy. A distinguished Dutch lawyer has declared: "The private owner is nowadays nothing but a trustee on behalf of his Government."[14] This has most conspicuously been true in the case of Germany which, even before the event of the Nazi regime, established governmental controls over external investment that completely denatured their ostensibly private character.[15]

[9] Exec. Order No. 6981 of March 2, 1935, and Exec. Order No. 7111 of July 22, 1935. 8 CFR 508.1, 508.2.

[10] Public Resolution No. 8, 67th Cong., 1st Sess. (1921), 42 STAT. 105, §§2, 4, 5; 42 STAT. 1930, 1946 (1921); Treaty of Versailles, Art. 297.

[11] 11 LAW & CONTEMP. PROB. 152 (Winter-Spring, 1945).

[12] *Id.* at 166. [13] *Id.* at 183.

[14] Prof. Mr. M. H. Bregstein, *De confiscatie van vijandelijk vermogen in het licht van het deviesenregiem,* Nederlands Juristenblad, 21 October 1950, No. 35, pp. 737, 740.

[15] Statement of Heinrich Kronstein, then Special Attorney, Anti-trust Division, Department of Justice, and Professor of Comparative Law, Georgetown University Law School, in *Hearings before the*

The traditions that have grown up with respect to the enemy's private investments were established when property meant something different from what it means today, and when war meant something different from what it means today.

I find myself in agreement, therefore, with Mr. Rubin's rejection of the notion of inviolability. His further conclusion, however, that enemy property should, after seizure, be devoted to the securing or paying of war claims has been rendered unrealistic, it seems to me, by a post-war situation that could not reasonably have been anticipated when his article was written.

In World War I, the Alien Property Custodian seized enemy property amounting to about six hundred million dollars. If a large portion of this had not been returned as a matter of grace, this property would have covered all of the claims allowed.[16]

In World War II, a smaller mass of property has been seized, while the war claims are probably much greater.[17] This fact is one of the bases of Mr. Rubin's argument. But we must set beside these figures the still greater sum that the United States finds itself compelled to expend each year for the support of occupied Germany. The United States must spend each year many hundreds of millions to preserve a defeated Germany from famine and disease, to permit even a bare minimum of rehabilitation or, in line with present policy, to establish economic conditions in Germany on a level much higher than that of bare subsistence.[18]

Senate Committee on Patents on S. 2303 and S. 2491, Pt. 3, 77th Cong., 2d Sess. 1334-1354 (1942). Roe, *War Measures, the Alien Property Custodian, and Patents*, 25 J. PAT. OFF. SOC'Y 692, 704-705 (1943).

[16] The awards of the Mixed Claims Commission, United States and Germany, totaled about $181,000,000 in principal. With interest to date of payment, or, if unpaid, to September 30, 1940, they totalled about $355,000,000. FINAL REPORT OF ACTING AGENT OF THE UNITED STATES BEFORE THE MIXED CLAIMS COMMISSION, UNITED STATES AND GERMANY 93 (1941); REPORT OF WAR CLAIMS COMMISSION 11 (1950). Enemy property seized in World War I was valued at $534,000,000. Income on this property to April, 1942, amounted to about $134,000,000, a total of $668,000,000. Of this amount there still remained in April, 1942, about $70,000,000 in government hands. ANNUAL REPORT, OFFICE OF ALIEN PROPERTY CUSTODIAN 142 (1944). Additional funds, however, had been supplied to the German Special Deposit Account (Dawes Plan payments, Debt Settlement Agreement payments, appropriations), and about $160,000,000 had been paid on account of the awards. REPORT OF THE WAR CLAIMS COMMISSION 11 (1950).

[17] The net equity vested was valued at about $416,000,000 as of June 30, 1949. REPORT OF OFFICE OF ALIEN PROPERTY 8-12 (1949). Harold I. Baynton, Assistant Attorney General, Director, Office of Alien Property, has estimated that this represents about $170,000,000 in excess of necessary reserves for claims and suits. *Hearings before a Subcommittee of Committee on Interstate and Foreign Commerce on H. R. 6808, 7001*, and other bills, 81st Cong., 2d Sess. 60-62 (1950). The immediate program of the War Claims Commission, it has been estimated, will require about $150,000,000. Statement of Daniel F. Cleary, Chairman, War Claims Commission, in *Hearings, supra*, at 31-32; REPORT OF WAR CLAIMS COMMISSION 58 (1950). This represents, however, only a first class of claimants. The Commission is charged with recommending further proposals for payment of war claims. War Claims Act of 1948, section 8, 62 STAT. 1245, 50 U. S. C. App. §2007 (Supp. 1950). Property damage, for example, is as yet unprovided for. Although it is difficult to estimate the amount of war claims that will be held valid, early official estimates were very high. See, for example, statement of Ansel F. Luxford, Assistant General Counsel, Treasury Department, *Hearings before Subcommittee No. 1 of the House Committee on the Judiciary on H. R. 4840*, 78th Cong., 2d Sess. 103-106 (1944); letter of D. W. Bell, Acting Secretary of the Treasury, set out in Mr. Luxford's statement; letter of James E. Markham, Alien Property Custodian, January 8, 1946, *Hearings before a Subcommittee of the Senate Committtee on the Judiciary on S. 1322*, 79th Cong., 2d Sess. 5-8 (1946); statement of Seymour J. Rubin, Deputy Director of the Office of Economic Security Policy, Department of State, in *Hearings on S. 1322, supra*, at 63. *Cf.* Rubin, *supra* note 12, at 179.

[18] See, *e.g.*, OFFICE OF THE UNITED STATES HIGH COMMISSIONER FOR GERMANY, FIRST QUARTERLY

To seize German property with one hand and to argue for its devotion to a particular purpose while, with the other hand, paying out of our own pockets these very much larger sums, becomes an unrealistic bookkeeping. If enemy assets must be devoted to some particular goal, I would suggest that it were much more reasonable to recognize that the damages done by Germany will never be made whole; that valid war claims will never be paid; that compensation for war claims to the extent that it is allowed must come, if at all, from the American Treasury; and to devote all German assets in this country directly to the relief of Germany, which we have, in fact, undertaken. But I do not feel that anything is gained by naming a destination for these assets. The assets should be seized, they should be retained, the ultimate proceeds should be paid into the United States Treasury, and the United States should frankly recognize that out of its undifferentiated funds it must both make whole such individual war claims as it feels should be recognized and support the economy of Germany to the extent that national policy requires. The contrary course represents a bookkeeping device apt to mislead the unsophisticated, and justifiable, if at all, only because of some demonstrable efficiency that it produces in the administration of government moneys. A review of the course actually followed with respect to these funds will show that our present procedure does not lead to efficiencies.

This discussion will be primarily concerned with German external assets. In order to set the discussion in its context, however, I shall review briefly the situation with respect to the external assets of other enemy countries.

Italy. Italian assets were originally vested like other enemy assets in this country. When Italy become a cobelligerent, the Alien Property Custodian stopped vesting additional Italian assets which remained frozen. However, the peace treaty with Italy, executed February 10, 1947, makes special provision for reparation to be paid to the Soviet Union and to the countries principally injured by Italian action—Albania, Ethiopia, Greece, and Yugoslavia (Article 74 A and B). The other United Nations were to satisfy their reparation claims out of Italy's external assets within their jurisdiction (Article 74 D and Article 79). Italy agreed to compensate its nationals for the loss of such property (Article 74 E and Article 79-3). The external assets authorized by the treaty to be retained by each of the United Nations were limited to the amount of claims against Italy. Thus, the treaty explicitly recognizes the principle of the application of external assets to war damage claims on the basis of a commitment for domestic reimbursement of the enemy's own nationals. Shortly after the treaty was signed, and before it became effective, a further economic settlement was made by the United States with Italy, under which the United States waived a substantial part of its own claims against Italy and a specific fund was

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REPORT ON GERMANY 23 (1949); COMMITTEE OF EUROPEAN ECONOMIC COOPERATION, GENERAL REPORT 116 (Dep't State Publication No. 2930, European Series 28, 1947); UNITED STATES ECONOMIC POLICY TOWARD GERMANY 38-39 (Dep't State Publication No. 2630, European Series 15 (No Date)).

provided by Italy to meet the war damage claims of private persons.[19] Thereupon Italian frozen assets were unblocked (General License No. 95, as amended August 29, 1947), and the vested assets of Italian nationals became in general returnable under the provisions of Section 32 of the Trading with the Enemy Act, as amended by the Act of August 5, 1947.[20]

Bulgaria, Hungary, Rumania. The treaties with the three satellite countries, Bulgaria, Hungary, and Rumania, which were signed February 10, 1947, similarly, in addition to reparation provisions in favor of certain specific countries, also expressly authorize the United Nations to retain the external assets within their jurisdiction of the three enemy satellites within the limits of war claims, and contain express commitments by the satellites to compensate their own nationals (Bulgaria, Articles 21 and 25; Hungary, Articles 23 and 29; Rumania, Articles 22 and 27.) The vesting of property of the satellite countries was halted on the coming into force of these treaties (September 15, 1947), in spite of the express treaty authorization for vesting.[21] The satellite countries, however, failed to live up to their treaty obligations and a tighter freezing program was recently put into effect, carrying with it a suggestion that the authority granted by the treaty to vest and retain external assets might, if necessary, be invoked.[22]

Japan. The situation with respect to Japan is somewhat less definite. Unlike the satellite countries, there is no peace treaty as yet, and unlike Germany, there is no reparation agreement reflecting United Nations policy in an unambiguous way. There are indications, however, that Japanese external assets are likely to be treated substantially like German assets. The Department of State has proposed a treaty under which the Allied Powers would in general hold Japanese property within their territory.[23] Section 39 of the Trading with the Enemy Act expressly prohibits the return of vested Japanese property, as well as vested German property, and it provides that the net proceeds of such property shall be devoted to the payment of certain specified categories of war claims and of such others as may later be designated, apparently without applying Japanese assets to the satisfaction of war claims against Japan specifically.

Special provision is made with respect to the Philippines. The statute creating

[19] The agreement, referred to as the "Lombardo Agreement," is described in OFFICE OF ALIEN PROPERTY ANNUAL REPORT 5-7 (1948); REPORT OF SENATE FOREIGN RELATIONS COMMITTEE ON S. J. RES. 138 (80th Cong., 1st Sess. (1949)).

[20] 61 STAT. 784 (1947), 50 U. S. C. App. §32 (Supp. 1950).

[21] I do not find any formal announcement of this policy. It is reflected, however, for example, in the letter of John W. Snyder, Chairman, National Advisory Council on International Monetary and Financial Problems, to Arthur H. Vandenberg, Chairman, Senate Foreign Relations Committee, of February 2, 1948, which states: "Thus, German and Japanese assets will be transferred [to the jurisdiction of the Office of Alien Property] and vested. Hungarian, Roumanian, and Bulgarian assets will be transferred [to the jurisdiction of the Office of Alien Property] and will remain blocked until a settlement of war claims with these countries is made."

[22] See Regulations of the Office of Alien Property, sec. 511.132a, revoking General License 32a (15 F. R. 1029, February 25, 1950), Department of Justice Press Release of February 25, 1950.

[23] Department of State Press Release No. 1180 of November 24, 1950.

the Philippine War Damage Commission[24] expressly contemplates that reparation will be received from Japan. It authorizes the Commission to compensate for certain categories of property damage caused by the Japanese in the Philippines. The source of this compensation is a fund of four hundred million dollars appropriated out of the United States Treasury, and it is provided that reparation received from Japan on account of Philippine war losses is to be used first to reimburse the Treasury for this fund. Presumably, some portion of Japanese external assets seized by the United States will be credited to this fund. The provision for the Philippine War Damage Commission is particularly significant, since it indicates how reparation receipts may be treated as devoted to satisfaction of war damage claims without creating the specific and direct tie-up which we shall see has been an unfortunate feature of the general statute on this subject, the War Claims Act of 1948.[25]

Germany. The principle of the seizure of German enemy assets and their devotion to the partial satisfaction of war claims was established by a series of agreements among the United Nations, culminating in the Paris Reparation Agreement. Each of the signatory countries, including the United States, there agreed upon the shares that they would take of various categories of German reparation. Included in these shares were to be the German enemy assets within the jurisdiction of each signatory country which each agreed to hold or dispose of in manners designed to preclude return to German ownership or control. These external assets were to be charged by each country against its reparation share.

In the Paris Agreement, each signatory country agreed that its share would be regarded "as covering all its claims and those of its nationals against the former German Government and its Agencies of a governmental or private nature arising out of the war (which are not otherwise provided for)." Thus by international agreement German external assets represent a portion of the funds which each country will look to for partial satisfaction of its war claims and those of its nationals.[26] It may be supposed that a similar relationship will be established so far as Japanese external assets are concerned.[27]

The principle established in the Reparation Agreement was confirmed by the War Claims Act of 1948, section 12 of which adds to the Trading with the Enemy Act a new section, section 39, expressly prohibiting any return of German or Japanese assets or the payment of compensation therefor, and directing that the net proceeds remaining upon the completion of administration, liquidation, and disposition pursuant to the provisions of the Act of any such property or interest therein shall be covered into the Treasury at the earliest practicable date.

[24] Philippine Rehabilitation Act of 1946, 60 STAT. 128, 50 U. S. C. App. §§1751-1806 (1946).

[25] 62 STAT. 1240 (1948), 50 U. S. C. App. §§2001-2013 (Supp. 1950).

[26] UNITED STATES ECONOMIC POLICY TOWARD GERMANY 108, 111 (Dep't State Publication No. 2630, European Series 15, App. h, Pt. I, Arts. 2A, 6A.)

[27] See discussion of Japan, *supra.*

Section 13(a) of the War Claims Act of 1948 created on the books of the Treasury a trust fund, to be known as the War Claims Fund, consisting of all funds so covered into the Treasury. The War Claims Act authorizes certain payments from the War Claims Fund for specified classes of urgent war claims, and contemplates that any sums remaining in the fund should be the subject of recommendations to be made by the War Claims Commission.

When one of the predecessors of the bill that became the War Claims Act was proposed, the Department of Justice, charged with the administration of alien property, recommended against the direct linking of vested assets and war claims. The Attorney General commented in the following terms on this point:

> Moreover, I suggest that provision for payment by specific appropriation is a more direct approach and would assure that any moral obligation of this Government to insure compensation to its nationals for war damages would not be dependent upon the uncertainties of ultimate financial settlement with enemy countries or ultimate realization on vested property. At the same time it should, of course, be borne in mind that the final net proceeds of vested German and Japanese property, as well as any sums received by this Government by way of reparation from those countries, will in fact ultimately constitute an offset against any sums appropriated for the payment of the war damage claims of American nationals, as well as some slight offset against the general cost of the war to the United States. This factor underscores the importance of a present congressional declaration, as herein recommended, that there be no return of vested property to Germany or Japan or their nationals.
>
> Accordingly, it would seem appropriate that this legislation be broadened to provide that the proceeds of German and Japanese vested property should be covered into the Treasury after completion of the program of administration and allowance of claims required by the Trading with the Enemy Act, as amended, and that a specific declaration of congressional policy be made to the effect that the proceeds of such property should not be returned.[28]

The Bureau of the Budget concurred in this recommendation and stated that a proposed covering into the Treasury of the proceeds of vested property was in its view

> . . . in keeping with good fiscal practice, and would make for simpler and faster administration of both enemy assets and American war claims than would the alternative concept of paying claims from the proceeds of enemy assets.[29]

The bill nevertheless passed with the provisions creating this direct relationship. The enactment of the bill in this form may well have been an inadvertence, in as much as the House Committee reporting on an earlier form of the bill had commented as follows:

> Section 1 provides that the net proceeds be covered into the general fund of the

[28] Letter of the Attorney General, April 15, 1947, in *Hearings before House Committee on Interstate and Foreign Commerce on H. R. 873* and other bills, 80th Cong., 1st Sess. 278, 280 (1947). *Cf. id.* at 299-300; *cf.* statement of John Ward Cutler, Acting General Counsel, Office of Alien Property, *id.* at 264-265.

[29] Quoted in REPORT No. 976 on H. R. 4014, 80th Cong., 1st Sess. 3 (1947).

Treasury as miscellaneous receipts. This provision is preferable to maintaining the identity of these funds by keeping them in a separate Treasury account. No useful purpose could be served by adopting such procedure. No legal or logical relationship exists as between the net proceeds resulting from the liquidation of vested enemy assets and any war claims against enemy governments which might be advanced and adjudicated in the future.[30]

The law has now been in effect for some two years, and it is possible to make some judgment as to the accuracy of the fears expressed in advance by the government agencies commenting on the bill.

One of the effects of the law as enacted has been to make the War Claims Commission, which is the principal agency charged with a responsibility for disbursements from the War Claims Fund, a spokesman for the groups of war claimants asserting a right to be satisfied out of the Fund. Obviously, with limited funds at its disposal, the War Claims Commission is faced with responsibility for difficult decisions. It would prefer to have at its disposal a larger fund. The Commission and the organized groups who expect to be beneficiaries of the Act tend to take a proprietary interest in the Fund. In consequence, on behalf of all applicants for the Fund, the War Claims Commission becomes in effect a pressure group with official status seeking the enlargement of the Fund. As a result, the Office of Alien Property becomes subjected to severe organized pressures for the completion of its task of liquidation at rates not consistent with the orderly discharge of its own duties.

The situation that results is illustrated by a pair of bills introduced by Messrs. Miles and Fernandez, both of New Mexico, directing the Office of Alien Property to turn over forthwith to the War Claims Fund one hundred and fifty million dollars.[31] These bills were introduced at a time when the Office of Alien Property did not hold liquid funds free and clear of claims already authorized by law in any sum approximating one hundred and fifty million dollars.[32] Moreover, had these bills been enacted and complied with, they would have served no useful purpose since it was not possible for the War Claims Commission, proceeding even at a rate substantially in excess of the progress that could be reasonably forecast for it, to make awards that would require so large a fund within, say, a year's time.[33] Nevertheless, these bills initially received the support of the War Claims Commission.[34] The Office of Alien Property proceeded to advance to the War Claims Fund the sum of fifteen million dollars, and gave assurances that by the time more was

[30] *Ibid.*

[31] H. R. 7001 and H. R. 7030, 81st Cong., 2d Sess. (1950).

[32] Statement of Harold I. Baynton, Acting Director (now Assistant Attorney General), Office of Alien Property, in *Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 6808, 7001* and other bills, 81st Cong., 2d Sess. 60, 61, 62 (1950).

[33] Statement of Daniel F. Cleary, Chairman, War Claims Commission, in *Hearings, supra* note 32, at 31; statement of Donald MacPhail, Office of the Director of the Bureau of the Budget, *id.* at 45-46.

[34] Letter of Daniel F. Cleary, Chairman, War Claims Commission, in *Hearings, supra* note 32, at 8-9.

needed it would be available. In the light of this, the Chairman of the War Claims Commission withdrew his support of the bills.[35]

This is an extreme example of a kind of problem that is constantly renewed in a number of less obvious respects. By private pressures on one side and Congressional pressures on the other, the War Claims Commission is made to feel responsible for seeing to it that "ample provision is made at any early date to take care of the claims" it expects to honor.[36] Since the "provision" is a matter of bookkeeping and not of the real existence of funds, and since decision as to the funds rests with the Congress, the sense of responsibility is not rationally justified but humanly very understandable. The Department of Justice, on the other hand, "must insist that the orderly liquidation of vested property and discharge of responsibilities imposed on the Office of Alien Property by existing law not be hampered by unnecessarily precipitous disposition of funds which may be needed" in its program and are not yet needed by the War Claims Commission.[37] The pressure by the War Claims Commission for the increase of the funds administered by it, and the resistances by the Office of Alien Property to unnecessary inroads on the funds administered by it, represent a form of governmental friction which takes up a great deal of energy, time, manpower, and generates heat but makes no effective contribution to government.

The opposition created by the War Claims Act between the policy inclinations of the War Claims Commission and those of the Office of Alien Property reflects itself in another important respect. From time to time it becomes necessary for the Congress to consider amendments to the Trading with the Enemy Act. These amendments are likely to affect the size of the ultimate fund applicable to war claims. For this reason, the War Claims Commission is one of the agencies whose views are consulted, and its almost unavoidable disposition is to recommend against any amendment to the law that might tend to diminish the fund ultimately available for war claims. As the War Claims Commission conceives its duty, it is obligated to insure at all times the sufficiency of funds to provide for payment in full of every valid claim given status by the War Claims Act of 1948. This situation, it seems to me, is not conducive to sound legislative policy.

If, for example, an amendment is introduced on behalf of a group of non-hostile persons who have been caught by the rather sweeping terms of the Trading with the Enemy Act, the question for consideration should be whether there is any justification for the United States to seize the property of such persons, and not

[35] Letter of Peyton Ford, in *Hearings, supra* note 32, at 7-8; statement of Donald MacPhail, *id.* at 43-44; statement of Daniel F. Cleary, *id.* at 32-33.

[36] Statement of Daniel F. Cleary, *Hearings, supra* note 32, at 34. It is worthy of note that throughout this portion of his statement the Chairman of the Commission was being pressed to seek protection against action the Congress might later find appropriate. *Cf.* statement of Thomas H. Roberts, General Counsel, War Claims Commission, *id.* at 188. Compare also Mr. Cleary's statement on S. 1292 and H. R. 1848, *id.* at 290-295.

[37] Statement of Harold I. Baynton, *Hearings, supra* note 32, at 60.

whether a release of the property will damage the fund. If the United States ought not in good conscience to seize the property in the first place, the fact that a release of the property could damage the fund is plainly irrelevant to any sound policy approach. Nevertheless this confusion repeatedly and inevitably arises as a result of the establishment of the War Claims Fund.

For example, a number of American women, who had lived in Germany during the Hitler regime and the war period and had acquired and exercised German citizenship, nevertheless were entitled by statute after the war to reclaim with retroactive effect their American citizenship.[38] Whether their property, seized as enemy, should be returned to them raises important political questions that go to the root of our conceptions of American citizenship, of loyalty, of the purpose of enemy property seizures. Strongly opposing views can be held on this question by reasonable men. The issue, however, is one that ought to be decided in terms of the justification or lack of justification for seizing the property, and not in terms of a weighing of the amounts that might be subtracted from the fund by a return.

Similarly, when the question is presented whether property of Jewish families exterminated at Auschwitz and Buchenwald should continue to be held by the United States, the issue should be determined in terms of the justification or lack of justification for the seizure and not in terms of the effect of a return on the fund. If, as I believe, there is no justification for the United States to seize the property of Hitler's principal and most direct victims,[39] it becomes immaterial whether a return of their property to their heirs or to a successor organization on behalf of other victims would substantially or only to a minor extent damage the fund available for war claims. Nevertheless, on questions of this kind the War Claims Commission becomes almost automatically a Cerberus protecting the fund. Its strong predisposition is to oppose any amendment of the law that might decrease the fund. In the case of the bill for the heirless property successor organization, which passed the Senate and was favorably reported on by the House Committee but did not pass the House, enactment of this legislation was seriously delayed by the circumstance that it was originally opposed by the War Claims Commission, and only later was this opposition withdrawn on the basis of representations that the sums involved would not exceed an outside estimate of three million dollars.[40]

[38] 54 STAT. 1146 (1940), 8 U. S. C. §717 (1946).

[39] *Cf.* Statement of General Lucius Clay on S. 603, in *Hearings*, *supra* note 32, at 162, 163; statement of Robert P. Patterson *id.* at 167; statement of George L. Warren, advisor on refugees and displaced persons, Bureau of United Nations Affairs, Department of State, *id.* at 175-176: ". . . the Department considers that the assets here involved are not the assets of enemies, but of enemies of our enemies, and to seize such assets would be morally reprehensible and unprincipled."

[40] Letter of Daniel F. Cleary, Chairman, War Claims Commission, January 10, 1950, in *Hearings*, *supra* note 32, at 152-153; letter of Daniel F. Cleary, May 10, 1950, *id.* at 158-160; statement of Thomas H. Roberts, General Counsel, War Claims Commission, *id.* at 188-190, 194; statement of Robert P. Patterson, *id.* at 168-169. In the Dutch system also, although it is recognized in theory that vested assets represent a source of partial payment of war claims, Bregstein, *supra* note 14, the proceeds of vested assets are nevertheless paid into the general treasury and there is no direct connection between vested assets and war claims.

Similarly, the dual national bill[41] was first opposed by the War Claims Commission but the opposition was withdrawn on the proviso that property returned to dual nationals did not exceed a ceiling of five million dollars.[42]

I think the legislative histories of these bills reflect a basic confusion between two types of issues that should not be regarded as on the same plane. The first issue is whether particular items of property or classes of such property ought to be seized by the United States as enemy property and retained as reparation. The second issue arises only if the first question can be answered affirmatively. It is, which of the possible beneficiaries of a reparation fund which is certain to be inadequate to meet all claims, should be preferred and to what extent. Separation of these questions would make for clearer and wiser determinations of policy. The direct linking of these questions resulting from section 13 of the War Claims Act has created confusions of thought that should have been avoided.

It is of interest to consider what has been done with the like problem in other countries. I am informed that a system very similar to ours was adopted in France, where the proceeds of sequestered enemy property are to be paid into an autonomous fund, out of which allowed classes of war claims are to be paid. It is my impression that this system is one adopted as a necessary tightening up of the system established in World War I which failed to provide adequate safeguards to assure an efficient liquidation of enemy property. Moreover, the French program avoids one of the most disturbing features of the American program in that the autonomous fund consists not solely of proceeds of sequestered property, but also of certain other funds that may from time to time be paid into it, and it has the authority to borrow.[43] Accordingly, it does not create the excessive pressure found in the American system for immediate liquidation regardless of considerations of sound administration, and it does not create the opposition between those classes who may expect to be beneficiaries of the fund and those classes who have claims that property ought not to be included in the fund.

In the American situation, there are several additional sources of funds which might be covered into or advanced to the War Claims Fund. Among these may be

[41] Finally enacted as Public Law No. 859 (81st Cong., 2d Sess.).

[42] Statement of Daniel F. Cleary, Chairman, War Claims Commission, in *Hearings, supra* note 32, at 288-293; *cf.* statement of Harold F. Reis, Acting Chief (now Chief), Legal Branch, Office of Alien Property, Department of Justice, *id.* at 267. To avoid misunderstanding, I should like to note that I did not favor the dual national legislation in the form it took. Nevertheless, the legislation was proposed on grounds of high policy. See, for example, statement of Raoul Berger, formerly General Counsel, Office of Alien Property Custodian, *id.* at 295ff. Whether the principles urged were sound or not does not seem to be affected by the number of dollars involved.

[43] Loi du 28 oct. 1946, Art. 5; Loi du 21 mars 1948. Cf. the analogous caisse autonome established in Belgium, Loi du 19 mai 1948; arrêté organique, 29 juin 1948. Here also the power of the fund to borrow money in the ordinary money markets, coupled with an assurance of funds from a variety of sources, removes the direct relationship between vested assets and war claims, which seems to me a source of difficulty in the American system. In the Dutch system also, although it is recognized in theory that vested assets represent a source of partial payment of war claims, Bregstein, *supra* note 14, the proceeds of vested assets are nevertheless paid into the general treasury and there is no direct connection between vested assets and war claims.

mentioned the proceeds of plant removals from Germany and the American share of the proceeds of German assets in neutral countries. Other possible sources of funds are mentioned by the War Claims Commission in its report to the President.[44] Moreover, if the current rate of payment of allowed claims by the War Claims Commission should exceed the funds available in the War Claims Fund, it would appear to be better fiscal management for the funds to be advanced out of general Treasury funds within such limits as are suggested by the estimates of the funds that will ultimately be available out of enemy property than to require either a forced liquidation of vested assets or a delay in payment of justified war claims.

I have the distinct impression that many of those who have considered these problems have been misled by bookkeeping appearances.[45] Property held by the Office of Alien Property is now property of the United States. It can be devoted to the partial satisfaction of war claims, or approximately equivalent amounts out of general funds can be so devoted. As the Assistant Attorney General in charge of Alien Property had pungently said: "The government has the money only once, and cannot spend it twice."[46] Arguments that suggest that it does not cost anything to use the vested assets can only mislead the Congress. It costs just as much to use those funds as to use general Treasury funds, and we will have a much clearer picture of what we are doing if we recognize this.

[44] REPORT OF WAR CLAIMS COMMISSION 57-60, pt. IX (1950).

[45] *Cf. e.g.*, S. 1072 for the relief of the Trust Association of H. Kempner which sought payment out of World War I funds for a claim arising out of peacetime trading losses. The proponent of the bill repeatedly protested: "I am not taking it out of the Treasury of the United States. I would not be responsible for coming in here with a bill to take any money out of the Treasury of the United States to pay Kempner on this claim." *Hearings before the Subcommittee of the Committee on the Judiciary*, 81st Cong., 1st Sess. (1949). The same proponent, in supporting a similar measure, H. R. 683, for the relief of Louise Peters Lewis (81st Cong., 1st Sess.), argued that "the bill takes nothing out of the United States Treasury. . . . Not a sou marquee, not a penny, not a mill." Report No. 71 to accompany H. R. 683, pp. 5, 7. The measure was passed, but vetoed. H. R. Doc. No. 370. This impression that it does not cost anything to spend vested assets seems to be reflected, for example, in the *Hearings* on H. R. 7001 and 7030, *supra* note 32, at 12-13, 32-33, 37.

[46] Statement of Harold I. Baynton, Acting Director (now Assistant Attorney General and Director), Office of Alien Property, Department of Justice, in *Hearings*, *supra* note 32, at 64-65.

PROTECTION OF NON-ENEMY INTERESTS IN ENEMY EXTERNAL ASSETS*

ELY MAURER†

I

SOURCE OF THE PROBLEM

The Allied countries which took part in World War II have engaged in the blocking and seizure of the external assets of enemy countries. In so doing they have been motivated generally by three objectives.[1] The first objective was that of economic warfare: to prevent the enemy from utilizing any of his assets abroad in furtherance of the enemy war effort and to put the assets to use in furtherance of the Allied war effort. Normally blocking controls were adequate to debar any enemy use, while seizure was necessary for putting the assets to Allied use. The second objective was that of security: to eliminate economic penetration in certain key industries located in Allied territory and to deprive the enemy of the foreign assets which might provide the sinews for a future war. The third objective was that of reparations: to obtain some compensation for the Allies and their nationals for the oftentimes incalculable losses of war.

With the passage of time, the importance of these objectives has changed. When the war ended, economic warfare became no longer applicable. Security measures with relation to enemy external assets loomed small in comparison with security measures to be taken inside the enemy countries and by way of alliances among the victors, especially in view of the emergence of the U.S.S.R. and its satellites as the dominant threat to peace. As for the reparation objective, that still has meaning since countries look to this source to indemnify themselves or their nationals for war losses, especially since there has been a dwindling away of other forms of reparations and the elimination of other avenues for the satisfaction of claims.[2]

* The opinions expressed in this article are those of the writer, and not necessarily those of the Department of State.

In this article, the United States Treaties and other International Act Series will be referred to as T.I.A.S.

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[1] Clayton, *Security Against Renewed German Aggression*, 13 DEP'T STATE BULL. 12 (1945); Bishop, *Judicial Construction of the Trading With the Enemy Act*, 62 HARV. L. REV. 721, 722, 742-743 (1949); Rubin, *Allied-Swedish Accord on German External Assets, Looted Gold and Other Related Matters*, 17 DEP'T STATE BULL. 155, 157, 161 (1947).

[2] The United States has not as yet seized the Bulgarian, Hungarian, or Rumanian assets in its jurisdiction as it is entitled to under the Peace Treaties. In view of the failure of these countries to provide compensation to American claimants for war damage it may be necessary to resort to these assets for satisfaction of these claims. With respect to Japan and Germany, where the United States bears the dominant role of supporting their economies, there is a less clear advantage to it in the program of seizure of these countries' external assets. The proceeds of such assets are presently earmarked for the

The amount of enemy external assets subject to seizure is large and embraces the following types: German, Japanese, Bulgarian, Hungarian, Rumanian, and Italian.[3] In addition, there are some special provisions concerning certain Austrian external assets. The picture of the seizures of the various types is as follows:

(1). *German.* The Allies during and since the war have proceeded under their internal legislation to seize German assets in their jurisdiction.[4] Under the Potsdam Agreement[5] of August 1, 1945 the U.S.S.R. was to secure the appropriate German external assets in Bulgaria, Hungary, Rumania, Finland, and Eastern Austria while the Allies were entitled to the assets elsewhere in the world. Accordingly, the U.S.S.R. secured in the Peace Treaties with Bulgaria, Hungary, Rumania, and Finland[6] the recognition of its title to all German assets in these countries transferred by the Control Council for Germany. Further the U.S.S.R. appears prepared in the Treaty with Austria, which is still under negotiation, to turn over the German assets in the Eastern Zone of Austria to Austria for liquidation as against compensation and certain special rights as to former German oil lands.[7] On the other hand, the United States, United Kingdom, and France were confirmed in their authority by the Peace Treaty with Italy to dispose of German assets in Italy,[8] and have made a memorandum of understanding with Italy for the liquidation of those assets;[9] they are taking action to liquidate German assets in Japan;[10] and they are prepared to turn over German assets in the Western Zone of Austria to the Austrians for liquidation.[11]

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satisfaction of certain war claims. War Claims Act, 62 STAT. 1247 (1948), 50 U. S. C. App. §2012 (Supp. 1950).

The amount of reparations from Germany and Japan by way of removals of industrial equipment has been reduced considerably from original estimates, thus disappointing countries which were looking to this source for the partial satisfaction of their claims. See, *e.g.*, on the German picture, REPORT OF THE SECRETARY GENERAL FOR 1949, INTER-ALLIED REPARATION AGENCY 11-12 (1950).

[3] Although Finland engaged in the war on the side of Germany, provision was made for the restoration of her external assets. Finnish Treaty, Art. 27. See generally, Martin, *The Treatment of Enemy Property under the Peace Treaties of 1947*, 34 TRANSACTIONS OF THE GROTIUS SOCIETY FOR THE YEAR 1948 77 (1949) (article brought up to date of publication).

[4] See generally, MARTIN DOMKE, TRADING WITH THE ENEMY IN WORLD WAR II (1943); and its supplement, THE CONTROL OF ALIEN PROPERTY (1947); and symposium, *Enemy Property*, 11 LAW & CONTEMP. PROB. (1945).

[5] Art. III, pars. 1-3, 8, 9. The text of the Potsdam Agreement is contained in Dep't State Press Release No. 238, March 24, 1947.

[6] Bulgarian Treaty, Art. 24; Hungarian Treaty, Art. 28; Rumanian Treaty, Art. 26; Finnish Treaty, Art. 26.

[7] Mosely, *The Treaty With Austria*, 4 INT'L ORG. 219, 230-231 (1950). The discussions of the Western Powers with the U.S.S.R. on the unresolved issues of the Treaty have practically come to a standstill, the Soviet Government apparently not being willing to conclude the Treaty. See Mosely, *supra*, at 219.

[8] Italian Treaty, Art. 77, par. 5.

[9] Memorandum of Understanding Between the United States, France, United Kingdom, and Italy on German Assets in Italy of August 14, 1947, T.I.A.S. 1664.

[10] The liquidation is being done by the occupation authorities in Japan, assisted by an advisory committee composed of representatives of the United States, Great Britain, and France. See REPORT OF THE WAR CLAIMS COMMISSION, H. R. DOC. NO. 580, 81st Cong., 2d Sess. 59 (1950).

[11] See, *e.g.*, *United States Renunciation of German Assets in Austria*, 15 DEP'T STATE BULL. 123 (1946). The Austrians are at present administering these assets as trustee for the United States in the United States zone in Austria.

Further, under the Paris Reparation Agreement of January 14, 1946 the 18 governments signatory to it, while committing themselves to liquidate German assets in their jurisdictions,[12] empowered the United States, United Kingdom, and France to make agreements with the neutral countries for the liquidation of the German assets within these countries.[13] Pursuant to this mandate agreements were reached with Switzerland, Sweden, Spain, and Portugal.[14]

(2). *Japanese.* The Allies during and since the war have blocked and seized Japanese external assets under their internal legislation.[15] The United States announced that it favors the inclusion of a clause in the Peace Treaty with Japan authorizing the retention of Japanese external assets.[16]

(3). *Italian.* By the Peace Treaty with Italy countries which were at war with Italy are entitled to seize Italian assets in their territory[17] and the U.S.S.R. by a special provision became entitled to Italian assets in Bulgaria, Hungary, and Rumania.[18]

(4). *Bulgarian, Hungarian, Rumanian.* By the Peace Treaties countries which were at war with Bulgaria, Hungary, and Rumania, are entitled to seize the external assets of these countries.[19]

(5). *Austrian.* By reason of the special status of Austria as a victim rather than ally of Germany, no provision is expected to be contained in the Treaty with Austria regarding its external assets, with two exceptions: Yugoslavia will be permitted to retain Austrian assets in its territory and the U.S.S.R., as part compensation for the surrender of German assets in the Eastern Zone of Austria, will receive the assets in Bulgaria, Hungary, and Rumania of the Danube Shipping Company, a corporation organized under Austrian law.[20]

The widespread seizure of enemy external assets has given rise to serious problems

[12] Pt. I, Art. 6A, T.I.A.S. 1655. The text and a comment on the Paris Reparation Agreement are contained in Howard, *The Paris Agreement on Reparation from Germany* (DEP'T STATE PUB. No. 2584). Pakistan became the 19th signatory after its split from India.

[13] Pt. I, Art. 6c.

[14] *Allied-Swiss Accord of May 25, 1946,* 14 DEP'T STATE BULL. 1121 (1946); *Allied-Swedish Accord of July 18, 1946,* T.I.A.S. 1657, 1731; *Allied-Spanish Accord of May 10, 1948,* T.I.A.S. 1773. The Allied-Portuguese Accord has not become fully binding because of an outstanding gold problem, and has not been published. Liquidation is, however, proceeding under Portuguese Decree Law No. 37, 377 of April 21, 1949. See also comments in *German Assets in Switzerland,* 14 DEP'T STATE BULL. 1101 (1946); Rubin, *Allied-Swedish Accord on German External Assets, Looted Gold, and Other Related Matters,* 17 DEP'T STATE BULL. 155 (1947); Mann, *German Property in Switzerland,* 23 BRIT. Y. B. INT'L L. 354 (1946).

[15] See note 4 *supra.*

[16] Dep't State Press Release No. 1180, Nov. 24, 1950.

[17] Art. 79. The United States has voluntarily agreed to release the considerable Italian assets in the United States. Memorandum of Understanding of August 14, 1947, Between the United States and Italy on Italian Assets in the United States and Certain Claims of United States Nationals, T.I.A.S. 1757, at 30.

[18] Art. 74, Pt. A, par. 2b.

[19] Bulgarian Treaty, Art. 25; Hungarian Treaty, Art. 29; Rumanian Treaty, Art. 27.

[20] Mosely, *supra* note 7, at 225, 231.

concerning the protection of the economic interests of non-enemies,[21] since enmeshed and intermingled in these enemy assets are substantial values in assets, or interests in assets, belonging in an economic sense directly, indirectly, or beneficially to non-enemies. Thus, the vesting action of Allied authorities has in numerous instances had the curious result of bringing harm to other Allied nationals and giving rise to a war claim. Of course where the non-enemy interest is a direct legal ownership right in the property seized, the remedial provisions of most custodial legislation will permit adequate legal redress. Where, however, the economic interest does not represent such a direct ownership right, solutions on an international level must be found even though such solutions in certain instances might be inconsistent with municipal principles of ownership. For the United States the problem of the protection of non-enemy interests in enemy property is especially important. This derives from the exceedingly large investment of American nationals abroad and from the tieup of immigrant classes in the United States with areas of origin.[22]

II

NON-ENEMY

At the threshhold of the problem of protecting non-enemy interests is the question of what individuals or enterprises are to be considered non-enemy. In the midst of war, the broadest definitions have been employed of enemy so as to prevent any loopholes.[23] These definitions were based on combinations of factors such as citizenship or nationality, territory in which located, activity in which engaged, persons by whom controlled, etc. Since the war the definitions have been narrowed. Without attempting to be exhaustive, some of the interesting and instructive cases in this field can be touched upon.

A. Friendly National and Dual National in Enemy Territory

An Australian who spent the war in the heart of Australia, engaging in no action hostile to the Allied cause, is the typical case of a non-enemy. A Frenchman residing during the war in French territory occupied by the Germans and engaging

[21] These problems, of course, would not exist if all enemy property were freed as has been urged by some writers. Borchard, *The Treatment of Enemy Property*, 34 GEO. L. J. 389 (1946); Sommerich, *A Brief Against Confiscation*, 11 LAW & CONTEMP. PROB. 153 (1945). But there appears to be justification for such seizures. Rubin, *"Inviolability" of Enemy Private Property*, 11 LAW & CONTEMP. PROB. 166 (1945), especially if claims against the enemy state or nationals are to be paid from the proceeds of the seized property, 3 C. C. HYDE, INTERNATIONAL LAW 1736-1737 (2d. ed. 1947); AMERICAN BAR ASSOCIATION, REPORT OF COMMITTEE ON ADJUDICATION OF WAR CLAIMS 35 (1945).

[22] According to the census taken by the Treasury in 1943, individuals and organizations in the United States reported ownership of 13 1/2 billion dollars in assets abroad. Of the 215,000 reporters, 168,000 were individuals, 27,000 of these were foreign citizens, and 2/3 of these later had come into the country after 1937. Individuals owned the large sum of 3 1/2 billion. *Foreword*, CENSUS OF AMERICAN OWNED ASSETS IN FOREIGN COUNTRIES (U. S. TREASURY DEP'T, 1947). No figures exist of how much property owned by individuals and organizations in the United States is involved in enemy property seizures.

[23] DOMKE, *op. cit. supra* note 4, cc. 3, 9, 10, 11. See generally on enemy character, with emphasis on British practice. Cohn, *German Enemy Property*—II, 3 INT'L L. Q. 530 (1950).

in no action hostile to the Allied cause is another case entitled to protection.[24] But what about the British citizen who lived in Germany before the war, and remained there during the war because he had difficulty in getting out, was sick, or had his business in Germany, etc. A strict view can be taken that unless he was involuntarily in Germany he should be considered as having thrown in his lot with the enemy and to be treated as such.[25] Another view looks merely to the Allied citizenship and exempts any of his external assets.[26] A country taking the strict view may still make an exception for its own citizens living in enemy territory.[27] When we come to the case of the dual national, having one enemy nationality, and residing in enemy territory, countries generally seize, relying on the indubitable enemy nationality,[28] although here too domestic considerations may lead countries to give favorable status to their own citizen who also has enemy nationality.[29]

B. Bestowal of Enemy Citizenship

With relation to the important question of citizenship, what effect shall be given to the bestowal of enemy citizenship on populations or groups that had been taken over by the enemy? Examples of this process took place by German action in Austria, Belgium, Czechoslovakia, Luxembourg, Yugoslavia, Danzig, Poland, Alsace Lorraine, and in the Baltic States.[30] No question seems to exist with relation to Austria, Belgium, Luxembourg, Yugoslavia, Danzig, Poland, and Alsace Lorraine. The laws changing the citizenship of their populations have been disregarded and assets of their nationals released as non-enemy. This has been done even though

[24] In some cases he may find his property vested. Thus the United States seized patents of citizens of France during the war if they were in enemy-occupied territory. These patents are now being returned. Procedures for return of such vested property have been agreed upon with most European countries. See OFFICE OF ALIEN PROPERTY, ANNUAL REPORT FOR FISCAL YEAR ENDING JUNE, 1947 84 (1947); see Alk and Moskovitz, *Removal of United States Controls Over Foreign-Owned Property*, 10 FED. B. J. 3, 28, and n. 41 (1948).

[25] Thus §32(a)(2)(C) of the United States Trading With the Enemy Act, 61 STAT. 785, 50 U. S. C. App. §32 (Supp. 1950). A broad claim has been made that paragraph 6 of Art. 79 of the Italian Treaty (and similar provisions in other treaties) authorizes the seizure of property of any person resident in Italy since such a person's property was "subject to control" during the war. Martin, *Private Property, Rights, and Interests in the Paris Peace Treaties*, 24 BRIT. Y. B. INT'L L. 273, 293 (1947). This ignores the fact that paragraph 6 talks of "Italian property" subject to control. Of course an Allied power might seize such a person's property if it could justify such seizure under international law as against the country of the person's nationality.

[26] Thus the Allied Accords with the neutrals are limited to persons of German nationality: Allied-Swiss Accord, Art. I(1), Annex, Art. IV(B), 14 DEP'T STATE BULL. 1121, 1124 (1946); Allied-Swedish Accord, T.I.A.S. 1657, p. 17; Allied Spanish Accord, Art. III, T.I.A.S. 1773, p. 4.

[27] See sec. 32(a)(2)(c) referred to in note 25, *supra*.

[28] Thus Switzerland and the United States at present seize the property of such dual nationals. Rule 6G of the Inter-Allied Reparation Agency, Rules of Accounting for German External Assets (1947) has a limited exception for a person who is expected to leave Germany and was formerly a resident of an Allied country.

[29] Thus a recent amendment permits returns to such American citizens, and even to certain women who became Germans by marriage and lost their American citizenship. Pub. L. No. 859, 81st Cong., 2d Sess. 7 (Sept. 29, 1950). A provision in the Allied-Swiss Accord calls for sympathetic consideration for property of Swiss origin belonging to women of Swiss birth married to Germans and residing in Germany, Annex, Art. I (A)(e), 14 DEP'T STATE BULL. 1121, 1122 (1946).

[30] See RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 13-14 (1944). See Cohn, *supra* note 23, at 531-537.

some of the inhabitants of these areas doubtless welcomed German citizenship.[31] A more difficult problem has been posed by the Sudeten Germans of Czechoslovakia, who were, rather indiscriminately, expelled after the war from Czechoslovakia into Germany. It will be recalled that the Sudeten Germans generally welcomed Hitler and German citizenship. Furthermore, in expelling them from Czechoslovakia, the Czech Government deprived them of Czech citizenship. Notwithstanding this, the Czech Government has insisted on its right to the assets of these individuals abroad and has attempted to prevent other countries from seizing these assets as German.[32] From the standpoint of the individuals concerned, some could make a good case that they never voluntarily accepted German citizenship nor wanted German domicile and that in fact they were anti-Nazi. These may charge that they should not be considered as German nationals and that it is in violation of democratic tenets to give any recognition to imposition of citizenship by the German Government.[33]

With respect to the Baltic States, the United States has continued its blocking controls over the assets of nationals of these countries in the United States, not recognizing the absorption of these countries by the U.S.S.R. For those nationals of so-called "ethnic" German stock upon whom the German Government after its conquest of these areas attempted to impose German citizenship, the precedent of the action taken with respect to Alsace Lorraine and Austria appears relevant. In the event that certain of these individuals may have voluntarily accepted German citizenship and withdrawn back to Germany before the advancing Russians, a case would be posed where seizure of property would appear to be legitimate.[34]

C. Inhabitants of Territories Separated from the Enemy

In addition to the problem of territories that had been absorbed by enemy coun-

[31] In some of these cases the property may be withheld because the owners may be guilty of collaboration. It should be noted that the United States Treasury exchanged letters of assurances which permitted countries to certify and secure the release of even the property of their collaborators, the theory being that these countries would deal with their own traitors best. However, the Office of Alien Property construes the Trading With the Enemy Act, under which it grants releases of vested property, to preclude return to collaborators.

[32] In the Paris Reparation Agreement of January 24, 1946, T.I.A.S. 1655, the Czech Government secured a clause (Part I, Art. 6D) which enabled it to seize the assets of these people without accounting for them as German assets. In the later working out of the accounting rules, the question arose as to the right of other countries to seize assets of Sudeten Germans in their jurisdiction. No solution was reached and the question was left without prejudice to the opposing views to be settled where necessary by bilateral governmental discussions. Thus Rule 7 of the Rules of Accounting for German External Assets, Inter-Allied Reparation Agency (1947) excludes from assets to be accounted for the assets of individuals who were nationals of an Allied country and not a national of Germany before the war. See, also, Simsarian, *Rules for Accounting for German Assets in Countries Members of the Inter-Allied Reparation Agency*, 18 DEP'T STATE BULL. 227, 229 (1948); and Commentary on the Rules contained in Inter-Allied Reparation Agency Document, I.A.R.A./AS/ Doc. 354 of Nov. 18, 1947.

[33] In cases arising in United States courts involving acquisition of German citizenship by residents in the United States who were citizens of absorbed areas, the courts have refused to place the acquisition of citizenship on the fiat of the German Government, but instead have based it on evidence of voluntary acceptance. U. S. *ex rel.* Reichel v. Carusi, 157 F.2d 732 (3d Cir. 1946), *cert. denied*, 330 U. S. 842 (Czech); United States *ex rel.* Schwarzkopf v. Uhl, 137 F.2d 898 (2d Cir. 1943) (Austrian); United States *ex. rel.* D'Esquiva v. Uhl, 137 F. 2d 903 (2d Cir. 1943) (Austrian); Zeller v. Watkins, 167 F. 2d 279 (2d Cir. 1948) (Danziger).

[34] See note 33, *supra*.

tries in their aggressive action preceding and during World War II, the question arises as to areas formerly part of the original boundaries of the enemy and now separated therefrom. There would seem little difficulty in principle in seizing the external[35] assets of Saarlanders, despite the economic union of the Saar and France, although the French have not been averse to claiming immunity from seizure of the assets elsewhere of Saarlanders. Seizure is more justified with relation to cases where the citizens of the former German territories, as, for example, East Prussia, now under interim Polish and the U.S.S.R. administration, were shipped into the new, constricted German territories. A different problem is raised with respect to inhabitants of former enemy possessions now freed, involving subject populations, for example, Korea and Manchuria. It would not appear proper to seize the external assets of these inhabitants as enemy nationals.[36] In this connection the Italian Peace Treaty permitted the seizure of the external assets of Italian nationals who were in ceded territories and opted to remain Italian, exempting from seizure the assets of those who took a new citizenship except if those assets were within Bulgaria, Hungary, and Rumania and thus fell to the U.S.S.R.[37]

D. Persecutees

Another kind of case, that of persecutees, warrants mention here, although it is the subject of more extended treatment elsewhere in this symposium. Those who were victims of Nazi and Fascist persecution on the bases of racial, religious, or political grounds were treated as enemies by the Axis regimes and it would be a mockery to seize their assets for reparations purposes. In the case of Jews who left Germany before 1941, the German Government took away citizenship and made them stateless.[38] In other cases, however, these victims remained the nationals of the countries persecuting them. With respect to German external assets, Rule 6F of the Inter-Allied Reparation Agency Accounting Rules[39] permits exemption from seizure of victims of Nazi persecution who are expected to leave Germany in a reasonable time. It appears that the British custodian follows the same rule, *mutatis mutandis,* in the case of Bulgarian, Hungarian, and Rumanian persecutees. The United States custodian operates under Section 32(a)(2)(C) and (D) which

[35] It should be noted that the discussion here is about the external assets of the Saarlanders, etc., and does not concern the right to seize the property of Saarlanders in the Saar, etc.

[36] Especially is this so in the case of Manchuria, whose seizure by the Japanese was generally not recognized.

[37] Italian Treaty, Art. 79, par. 6(g).

[38] Salwin, *Nationality Status of German Refugees,* 30 MINN. L. REV. 372, 374 (1945). Some decisions have been rendered in the United Kingdom which reach the curious result that the German Reich could not denationalize its subjects located abroad by the 1941 decree, these decisions thus subjecting them to the disabilities of German citizens. See Salwin, *supra,* at 392 n. 60. For criticism of these and other decisions, see Lauterpacht, *Nationality of Denationalized Persons,* JEWISH YEARBOOK OF INTERNATIONAL LAW (1949).

[39] See note 28, *supra.* Article 5 of the London Patent Accord on German Patents of July 27, 1946, signed by numerous countries, permits the exemption of patents owned by German refugees. See text, 15 DEP'T STATE BULL. 300 (1946).

permits release of the assets of Nazi and Fascist victims wherever resident.[40] It should be pointed out that although articles in the Italian, Bulgarian, Hungarian, and Rumanian Peace Treaties[41] permit the seizure of the external assets of their nationals, without excluding therefrom Nazi or Fascist victims, these articles should be read in conjunction (1) with the article in all these Treaties dealing with the restoration of rights and interests of Allied nationals, which includes therein the rights and interests of individuals who were treated as enemy,[42] and (2) with the special articles in the Hungarian and Rumanian Treaties which speak of the restoration of the rights and interests of those who were the objects of racial or religious persecution.[43] It is illogical for the Allies to have required that the assets of these victims be restored in the country of their nationality, and yet be seized outside such country. Further, under several agreements on the liquidation of German external assets, exemptions have been granted to the property of persecutees.[44]

E. Enemy Citizen Resident Outside Enemy Territory

Most countries have exempted from seizure the assets of the Milwaukee German, that is, the enemy national who has been residing for a long time in the jurisdiction or in the territory of other friendly countries, has not taken out citizenship papers, but has not been guilty of any acts hostile to the Allied cause. The Inter-Allied Reparation Accounting Rules for German assets and the London Patent Accord permit the exemption of the assets of Germans based on residence outside of Germany.[45] Similarly the various neutral accords are directed at Germans in Germany with the addition that Germans outside Germany who are repatriated may have their property seized.[46] A similar exemption is made in the Memorandum of Understanding with Italy with respect to German assets.[47] With respect to seizure of Italian, Bulgarian, Hungarian, and Rumanian assets in Allied jurisdictions there is also an

[40] Section 32(a)(2)(C) and (D), 61 STAT. 785, 50 U. S. C. App. §32 (Supp. 1950). Congress recently passed legislation requiring the Executive to seek in intercustodial agreements the protection on a par with United States nationals of persecutees who had become permanent residents and citizens of the United States before the effective date of any agreement. Condition 3, Pub. L. No. 857, 81st Cong., 2d Sess., approved Sept. 28, 1950. For comparison of British and American practice, see Martin, *supra* note 3, at 94-96; Cohn, *German Enemy Property*—III, 4 INT'L L. Q. 60, 72-77 (1951).

[41] *E.g.*, Italian Treaty, Art. 79.

[42] *E.g.*, Italian Treaty, Art. 78, par. 9(a).

[43] *E.g.*, Hungarian Treaty, Art. 27; Rumanian Treaty, Art. 25.

[44] *E.g.*, Allied-Swedish Accord, *supra* note 14, at 17 ("persons whose case merits exceptional treatment") and *id.* at 22 ("proceeds of property found in Sweden which belong to victims of Nazi action who have died without heirs"); Memorandum of Understanding with Italy, *supra* note 9, at 1 ("assets of individuals deprived of life or substantially deprived of liberty").

The Swiss have heretofore not allowed an exception for persecutees under the Allied-Swiss Accord, *supra* note 14. At the present time this Accord is not being implemented. It is hoped to take up this issue in the event of general discussions on outstanding problems.

[45] Rule 5(A)(2) of *Rules of Accounting*, *supra* note 32, exempts assets of "any individual who had German nationality on 24 January 1946 and who on that date was physically inside Germany or had his residence in Germany." London Patent Accord, *supra* note 39.

[46] See references in note 26, *supra*, to Allied-Swiss, Allied-Swedish, and Allied-Spanish Accords. The Allied-Spanish Accord, however, embraces all Germans not resident in Spain or who are expelled from Spain.

[47] Par. 2 of Memorandum, *supra* note 9.

exemption for the property of nationals of those countries permitted to reside in United Nations territory where the property was not subject to special restrictions because of the owner's hostile attitude and potential danger to the Allied cause.[48]

F. Enterprises in Enemy Territory

It is with respect to enterprises located in enemy countries that some of the major difficulties have arisen. If the enterprise is merely a firm or individual proprietorship doing business under some trade name, it is generally not given a nationality independent of the nationality of its proprietor. Cases where this is put to the test are apt to be rare. Thus, a case may show up of accounts receivable originating before the war owing to a firm in Germany, where the firm owner left Germany as a persecutee and has now become a citizen of an Allied country. In most cases individual proprietorships in enemy territory are apt to be small, do a local business, and be owned by an enemy national. More difficult is the case of partnerships which are in some cases considered as having an independent juristic personality and thus a national of the country under whose laws they have been organized, despite the nationality of the partners. The general rule, however, independent of enemy property matters, seems to be to ignore the partnership form and deal with the property involved on the basis of the nationality of the partners.[49] When we come to corporations organized under enemy laws, these have juristic personality and would for ordinary purposes be considered as having the nationality of the country in which they are organized. The harsh effect of such a conclusion has in some cases been obviated by the doctrine that if the corporation is controlled by certain nationals it should be considered as having their nationality. Further than this, however, international law furnishes numerous instances where protection has been sought by a country with respect to the property of such a corporation if in the corporation there is a substantial ownership by citizens of that country. Generally this is based, not on a negation that the corporation is a "national" of the offending country or of a third country or of an enemy country, but on the ground of harm to the property

[48] Art. 79, par. 6(c), Italian Treaty. Similar clauses are in the other treaties. The United States suggested the language which was adopted and had in mind not to affect the property of all Italians who were subject generally to some mild restrictions in the United States, but only the property of those who were interned or more narrowly restricted because of their Fascist views and activities. See, however, interpretation in Mann, *Enemy Property and the Paris Peace Treaties*, 64 L. Q. REV. 492, 507-508 (1948).

[49] EDWIN M. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 613-615 (1925); 2 C. C. HYDE, INTERNATIONAL LAW 900-901 (2d. ed. 1947); 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW 827 (1937). Thus where legislation calls for the payment of debts out of vested assets to American nationals the Office of Alien Property has made payment to an American partner in a foreign partnership. Mason and Efron, *Payment of American Creditors from Vested Assets*, 9 FED. B. J. 233, 236 (1948).

Under the Brussels Intercustodial Agreement of December 5, 1947, discussed in III(G)(1) below, firms and partnerships are lumped with corporations under the term "enterprise organized under the laws" of another country. Annex, Arts. 11, 21. The text of the agreement is given in Maurer and Simsarian, *Agreement Relating to the Resolution of Conflicting Claims to German Enemy Assets*, 18 DEP'T STATE BULL. 3, 6 (1948). No harm will be done by this lumping, except in a rare case of a small partnership interest, as protection is accorded non-enemy interests by the Brussels Intercustodial Agreement.

interests of nationals of the protesting country.[50] It may be advisable thus to discuss this type of case in the next part as involving property in which Allied nationals have interests.[51]

G. Enterprises Outside Enemy Territory but Enemy Controlled

Paralleling the above cases of a firm, partnership, or corporation in enemy territory are the cases of enterprises outside enemy territory but controlled by enemy individuals. Generally, enemy property custodians, who now uniformly look behind the corporate or enterprise veil, would ascribe to these enterprises an enemy character.[52] While the enemy property custodian of the corporate domicile may seize the enemy stock without disturbing the non-enemy stock interests, for the custodian of another state having jurisdiction over the property of the corporation the problem of protecting the investment of the non-enemy stockholders is complicated by the fact that such stockholders would have no interest in the property to be recognized as a matter of municipal law.[53] In this respect the problem is very similar to that previously discussed involving corporations organized under enemy laws, and it will be more profitable to consider this type of case also in the next part.

III

NON-ENEMY INTERESTS

This subdivision deals with the case of property belonging to or in the name of an enemy, but with which there is involved property, rights, or interests of a non-enemy which raise a question of protection.[54]

A. Split Ownerships

The obvious kind of case which does not present much difficulty concerns a split ownership dependent on the duration of the interest, such as a leasehold, a term for years, a life estate, a remainder estate, a license right in a patent, a ship charter. Where one of these belongs to a non-enemy and the residual proprietary interest belongs to an enemy, protection would generally be accorded to the non-enemy, al-

[50] 2 HYDE, *op. cit. supra* note 49, at 904, 905; BORCHARD, *op. cit. supra* note 49, at 622; 5 HACKWORTH, *op. cit. supra* note 49, at 840. See interesting recent article, Jones, *Claims on Behalf of Nationals Who Are Shareholders in Foreign Companies*, 26 BRIT. Y. B. INT'L L. 225 (1949).

[51] Just as it is possible to label a German citizen in Germany as a non-enemy (*e.g.*, persecutee), it should be possible to label a corporation in Germany owned by Americans, non-enemy. It should also be possible to label a corporation partly owned by Americans and partly by Germans as partly enemy and partly non-enemy. If this mode of reasoning were adopted, it would not be necessary to consider the protection of non-enemy shareholders in the next part on the basis of their interests in the property owned by an enemy.

[52] DOMKE, *op. cit. supra* note 4, c. 9. To be completely logical, as far as vesting for reparations after the war is concerned, if a country vests the property of a corporation organized outside of enemy territory as being enemy controlled, it should exempt the property of a corporation organized in enemy territory, if non-enemy controlled. Countries have, however, pursued a policy of vesting in both cases, as a hangover from dragnet blocking controls and as a way to maximize vested assets.

[53] A country may allege that the corporation being organized in friendly territory is a non-enemy national, but in view of the general practice of piercing the corporate veil, this is not apt to receive much attention.

[54] Here, again, no attempt is being made to be exhaustive.

though vesting procedures may sometimes permit the seizure of the complete title to be followed later by according protection in compensation to the non-enemy. Similar protection would appear warranted with regard to split ownerships such as tenancies in common, joint tenancies, tenancies by the entirety, etc., where a non-enemy is joined with an enemy in ownership. Here it should be proper and fair to divide between non-enemy and enemy, although difficulties may arise as for example in bank accounts where both parties have the power to draw out and expend the entire account.[55]

B. Nominees, etc.

Cases will also exist where the non-enemy has employed an enemy as nominee, agent, dummy, or cloak to hold the title. Vesting countries have never hesitated to look behind such façades to seize property as being owned by an enemy and so should reciprocally give protection to a non-enemy in this kind of case.[56]

C. Trusts

Another kind of case is that of trusts in which the trustee may be an enemy while the beneficiary may be a non-enemy, or vice versa, or different combinations of enemy and non-enemy trustees and beneficiaries. It would be inappropriate to seize the corpus of the estate if the trustee is an enemy, even though the property of a trust is held in his name:[57] protection should be afforded the non-enemy equitable interest. Some difficulty may arise where the corpus of the trust is located in different vesting jurisdictions and where there are mixed enemy and non-enemy beneficiaries, since each custodian will want to vest the enemy equitable interest and to shift the responsibility for discharging the obligation to the non-enemy beneficiary to another jurisdiction. The fair solution would be for each custodian to vest the equitable enemy interest and satisfy the equitable non-enemy interest in the ratio that the assets in the jurisdiction bear to the assets everywhere. Another possibility is for one of the two enemy property custodians to agree to release assets in his jurisdiction to the other if that is the place of principal administration. This will serve for ease of administration, protect the non-enemy interests, and perhaps will work out be-

[55] See *e.g.*, Commercial Trust Co. v. Miller, 262 U. S. 51 (1923).

[56] In this kind of case where a non-enemy acts as a façade, a question sometimes arises of protecting a property interest he may have in the corpus belonging to the enemy national. Whether such protection should be accorded would seem to be dependent on the guilt involved in acting as cloak or nominee. See Bishop, *supra* note 1, at 755-757.

In some cases the relationship involved is more comparable to a trustee, which is discussed in the next subdivision C. In some cases the titleholder might be a corporation organized specially for this purpose, or one already in existence which enters into the conspiracy of concealment.

It would appear to do violence to the intention of the treaties and agreements dealing with external assets seizures to construe "property belonging to" or "property owned by" an enemy national to cover cases where the enemy national holds the title as nominee, agent, dummy, etc. See Mann, *German External Assets*, 24 BRIT. Y. B. INT'L L. 238, 252 (1947).

[57] See, however, Mann, *supra* note 48, at 513. It seems proper as in note 56 *supra* not to construe "belonging to" or "property owned by" as covering simple legal title.

tween the two custodians from a money standpoint so that little loss is suffered.[58]

D. Decedents' Estates

Problems similar to those in trusts crop up in decedents' estates. In Anglo Saxon jurisprudence, except for real estate which descends directly to heir or legatee, the estate passes to the executor or administrator. A non-enemy heir to the real estate or to specific personalty would appear to have a legal or equitable estate which would be entitled to protection. Under continental law all property descends immediately to the heirs or legatees, so that non-enemies would appear to have a legal estate entitled to protection and the enemy a legal state which would be subject to vesting.[59] In so far as there are no bequests or devolutions of specific property in an estate involving enemies and non-enemies, but general bequests or devolutions of sums of money, say, the question arises here, as in a trust, as to which custodian shall vest the enemy right and which shall satisfy the non-enemy right. The solutions suggested above for trust cases would appear applicable here.[60] However, it should be noted that in the case of decedents' estates there is also apt to be involved the matter of the protection of non-enemy creditors or the defeat of enemy creditors. It will be more convenient to take up creditors' rights in subdivision *F* below.

E. Foreign Currency Cover Accounts

The case of foreign currency cover accounts taken out by a non-enemy through an enemy bank presents interesting problems, which are more capable of simple solution by international agreement or as a result of diplomatic intervention by devices which are not restricted to the legal pattern of ownership rights under municipal law. Suppose an American citizen requested a German owned bank in the Netherlands or a bank organized under the laws of Germany to set up an account for him in the amount of 1,000 British pounds. In some cases the bank might cover this obligation by requesting a British bank to open an account on

[58] Annex, Arts. 8 and 9 of the Brussels Intercustodial Agreement, *supra* note 49, provides for such a solution in certain types of trust cases.

It is appreciated that the hypothetical in the text is a simple one and that trusts may be very complex giving rise to serious difficulties in weeding out the enemy from the non-enemy interests.

[59] See Mann, *supra* note 48, at 514.

[60] The kind of case under discussion is where a testator leaves $20,000 to *X*, an enemy national, and $20,000 to *Y*, a non-enemy, and the testator's whole property consists of jewelry worth $15,000 located in a safe deposit box in the United States and jewelry worth $25,000 located in a safe deposit box in France. It would seem fair that the American custodian should be able to seize 1/2 of the $15,000 as enemy, releasing the other half to the non-enemy national *Y*. Or if it be assumed that the deceased died domiciled in France the United States custodian could agree to the rule of release of assets to the domiciliary administration, so that France would vest the complete enemy interest while releasing the non-enemy interest. The United States custodian would hope that things might balance out by property being released in some cases to the United States as the place of domiciliary administration. Subject to certain exceptions, the solution of release to the domiciliary administration is the one set forth in the Annex, Arts. 7 and 9 of Brussels Intercustodial Agreement; *supra* note 49. See Mason, *Conflicting Claims to German External Assets*, 38 GEO. L. J. 171, 178 (1950). A practically identical text on trusts and decedents estates is contained in the United Kingdom-France Intercustodial Agreement of July 15, 1948, Treaty Series No. 74, CMD. 7551 (1948), and the United Kingdom-Netherlands Intercustodial Agreement of September 20, 1949, Netherlands No. 1 (1949), CMD. 7803 (1949).

its books with a sub-designation in the name of the American citizen or with a sub-designation by some special letter or number. In such a situation it could be argued that the enemy bank is not the real owner of the account in the British bank but merely a trustee for the non-enemy who has the equitable interest and who as in the trust cases previously discussed would be entitled to protection. A more difficult case is presented when the enemy bank covers its indebtedness to the American citizen, not by the specially designated account described above, but by some "omnibus" account in the British bank. This is an account which is in the amount of, say 10,000 pounds and is designed by the enemy bank to cover not only the 1,000 pounds owing to the American national but the pounds owing to all other individuals having pound accounts with it.[61] The omnibus account is merely described on the books of the British bank as belonging to the enemy bank. It has been argued that the owner of the account is the enemy bank and that therefore a custodian may vest it no matter whether or not it is cover for non-enemy accounts. The non-enemies, the argument goes further, have their rights against the enemy bank and have no specific interest in the British cover account. The fault in this argument lies in the fact that it is the banking practice to require the person opening the account in a foreign currency to take the risk of any loss that may occur. Thus, in the example given, if the British custodian seized the account on the books of the British bank as being enemy this would constitute a defense to any suit by the American citizen against the German bank. In other words, the real loss by reason of the British custodian's action would fall upon the American national. In this case, if it be considered that the account in the British bank belongs to the enemy bank, the American citizen is, as it were, an insurer against the suffering of any loss by the enemy bank and should be considered as having a protectible interest in the account. The problem becomes quite similar to that which has concerned writers in the insurance field, that is, whether an individual has such an interest in property as to permit insurance of it, the courts generally striving to reach the conclusion that there is an "insurable" interest where proximate loss would result from the happening of the insured-against event.[53]

It should be pointed out that, under the letters of assurances entered into by the United States Treasury with various European governments permitting them to certify out non-enemy assets in the United States, permission was given to certify out amounts in omnibus accounts in the United States of German owned banks in their jurisdictions to the extent these accounts served as cover for non-enemy nationals accounts, leaving, however, enough in such accounts to cover the obligation

[61] This is an oversimplified picture, since the cover of the enemy banks for all its pound obligations might be through several British banks, or intermediate non-British banks might be used, or the cover might be in bond accounts rather than currency accounts. Further a bank might not cover all its accounts 100 per cent but keep only 80 per cent cover. In so far as protection is accorded where there is less than 100 per cent cover, it should be to the extent of the cover.

[62] See Harnett and Thornton, *Insurable Interest in Property: A Socio-Economic Revaluation of a Legal Concept*, 48 COL. L. REV. 1162, *passim* (1948).

to enemies. The matter of foreign currency cover accounts of enemies is covered in the Brussels Intercustodial Agreement.[64] The parties thereto not being able to reach agreement on the location of the property interest in foreign currency cover accounts of enemies decided to lump all kinds of enemy foreign currency accounts and divide the proceeds of vesting equally between the two custodians concerned.[65] No specific provision was included covering foreign currency cover accounts of non-enemy nationals, except that provision was made in the Brussels Intercustodial Agreement that left their solution unprejudiced.[66]

F. Creditors

The protection of non-enemy creditors of an enemy raises a series of problems. In the simple case where there is enemy property in the jurisdiction with respect to which a non-enemy creditor has some kind of lien, *e.g.*, as a pledge or mortgage, the lien would doubtless secure protection in most jurisdictions as a proprietary legal interest.[67] In the United States this protection is afforded to both American and other non-enemy nationals.[68]

In the case of a decedent's estate, having an enemy heir or legatee, there may be a non-enemy creditor of the decedent or of the enemy heir or legatee. In the former case the United States law appears to recognize that the title of the enemy heir or legatee is subject to the non-enemy creditor's rights. Creditors would be recognized during the period of administration who are American nationals or nationals of non-enemy countries.[69] In the second case, of a creditor of the enemy heir or legatee, the question appears to be of the general type involving any unsecured non-enemy creditor of an enemy individual having property in the vesting jurisdiction.

In the case of such an unsecured creditor, the United States law permits an American national,[70] but not a foreign national, to seek payment from these assets. This can be explained as a concession to reduce the loss of American creditors who may have relied on the assets of the enemy debtor in the jurisdiction in extending the original credit. Also, in discriminating against foreign creditors it has the effect

[64] Annex, Art. 5 of Agreement, *supra* note 49.

[65] See Mason, *supra* note 60, at 177.

[66] Annex, last sentence of Art. 11 A of Agreement, *supra* note 49. This sentence left undetermined whether the cover account was to be considered the property of the bank or the depositor. It should be pointed out that the United Kingdom-France and United Kingdom-Netherlands Intercustodial Agreements adopt the rule of releasing all cover accounts to the bank which requested the opening of the account. Annex, Art. 5 of the Agreements, *supra* note 60.

[67] See Macon and Efron, *supra* note 49, at 240. Part I, Art. 6A of the Paris Reparation Agreement, *supra* note 12, speaks generally of liens and other "in rem" charges as being entitled to subtraction in accounting for German assets. This is confirmed by Rule 16 B of the Inter-Allied Reparation Agency Accounting Rules, *supra* note 32. Art. 26 E, Annex, Brussels Intercustodial Agreement *supra* note 49, recognizes bona fide liens of non-enemy nationals which originated before blocking dates.

[68] See Silesian American Corp. v. Clark, 332 U. S. 469 (1947).

[69] Some few states may discriminate against foreign creditors. The Office of Alien Property would generally not vest until creditors had been satisfied.

[70] Sec. 34(a) of the Trading with the Enemy Act, 60 STAT. 925-926 (1945), 50 U. S. C. App. §34 (a) (Supp. 1950). There are also included residents in the United States since the beginning of the war and by way of special exception Philippine citizens.

of maximizing the amount of reparations receivable by the vesting jurisdiction, relegating the non-enemy foreign creditor to the assets in his jurisdiction for satisfaction of his debt. Even if no assets exist in the other jurisdiction, the debt will doubtless continue unimpaired,[71] and recourse may be had by the foreign creditor against the debtor himself at his domicil in the enemy state, although one disadvantage of this is that the creditor may have to be satisfied with an inferior and non-convertible currency. Of course cases may exist where the property in one vesting jurisdiction is the only property of the debtor and the probability of the debtor acquiring any more property is so remote that the vesting of the property in that jurisdiction and the barring of a foreign creditor's claim will result in economic loss. This seems a non-proximate effect for which no special provision need be made.[72]

Thus far we have been discussing the situation of a non-enemy creditor of an individual enemy debtor. In the case of creditor of a corporation organized in the jurisdiction which is owned wholly or partly by the enemy, the normal practice of enemy property custodians is to vest the enemy owned shares of the corporation and permit the corporation to pay off any non-enemy creditors, local or foreign.[73] In the case of the creditor of a corporation organized in non-enemy territory but owned or controlled by enemies, or in the case of a creditor of a corporation organized under enemy laws, the United States Trading with the Enemy Act permits satisfaction from assets here of the debts of American creditors only, and does not permit satisfaction of foreign creditors.[74] The arguments for this practice which are put forth in the case of the individual enemy debtor apply here, namely, that the national of the vesting jurisdiction has relied on the assets here in extending credit, and the foreign creditor can seek out assets in his own jurisdiction or in any event can seek satisfaction in the jurisdiction of the corporation's organization. It can be argued that only in the event that the seizure of the assets is of such importance in comparison with the global assets of the corporation as to cause the bankruptcy or insolvency of the corporation, has the foreign creditor been really harmed. In the case of liquidation because of insolvency this will mean a permanent inability to secure satisfaction of the indebtedness. If the corporation continues operation, though technically insolvent, there is some possibility of course that future earnings will enable satisfaction of the obligation.[75]

[71] The Peace Treaties heretofore have continued obligations by enemy nationals to non-enemy creditors. *E.g.*, Italian Treaty, Art. 81.

[72] Part I, Art. 6A of the Paris Reparation Agreement, *supra* note 12, permits payment for accounting purposes to any non-enemy creditor of the particular German debtor from the assets of the debtor in a country's jurisdiction. By rule 18 of the Accounting Rules, *supra*, note 32, this was restricted to creditors of the jurisdiction.

[73] One of the bitter complaints made against the U.S.S.R. was its refusal to recognize the liabilities of enterprises which it took over in the Eastern Zone of Austria. See Mosely, *supra* note 7, at 232.

[74] See note 70, *supra*.

[75] Hyde states that the United States would probably not be reluctant to seek the protection of American bondholders or stockholders in a foreign corporation if a foreign government were irreparably injuring their interests. 2 HYDE, *op. cit. supra* note 49, at 906. It has been noted that there is a tendency to protect ownership interests and overlook creditor interests. Rubin, *Nationalization and Com-*

It should be pointed out that even where a jurisdiction may be prepared to recognize the interest of the foreign creditor in assets, it may prefer to do so by agreement assuring reciprocal treatment and a fair application of assets everywhere to the indebtedness.[76] Another complexity is introduced when non-enemy shareholders as well as creditors are involved. This is considered in *G 4* below.

G. Shareholders

One of the major problems in the field of protection of non-enemy individuals arises from shareholdings in corporations which are organized under enemy law or are enemy controlled.[77] These shareholders may find they have suffered a real loss by vesting of the assets of the corporation as being enemy, and their loss would be almost irremediable without diplomatic intervention since they cannot plead under the municipal custodian laws that type of direct ownership interest in the property which under those laws would qualify them to assert a claim based on title to the property. In this instance, particularly, international law devices for protection of interests may well cut across accepted doctrines of corporate law in order to prevent a real injury.

One situation may be distinguished at the outset. When a corporation is organized under the laws of a vesting jurisdiction, even though there is a controlling enemy share interest, the enemy property custodian normally only seizes the enemy shares and leaves untouched the non-enemy shares. But when the corporation is organized in a foreign jurisdiction and is enemy controlled, the practice of custodians

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pensation: A Comparative Approach, 17 U. OF CHI. L. REV. 458, 472 (1950). This may be explained in part because harm to creditors is often of a contingent nature. See also on creditor protection, Jones, *supra* note 50, at 246-247, 252, 257.

Umpire Parker in the United States-German Mixed Claims Commission did not hesitate to interpret that section 5 of the Treaty of Berlin called for the protection of bondholders of German corporations having property which was lost or damaged. CONSOLIDATED EDITION OF DECISIONS AND OPINIONS, 1925-1926 324-325 (1928):

"Through the much-misunderstood clause of section 5 dealing with claims of American nationals for 'loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, *or otherwise*,' provision was made for the protection of all interests of American nationals in both domestic and foreign corporations, where such American nationals had indirectly suffered damage through the ownership of shares of stock in such corporations, *or of bonds thereof, or otherwise*." (Emphasis supplied.)

In the American Mexican Claims Commission Report a case is given of American nationals having a 28 per cent bond and a 50 per cent stock interest in a Mexican corporation whose entire property was seized by the Mexican Government. Since the property seized was worth less than the outstanding bonds the claimants were held entitled to 28 per cent of the value of the property seized, but received nothing by reason of their share interest. REPORT TO SEC'Y OF STATE, AMERICAN MEXICAN CLAIMS COMMISSION 546 (1948). It should be noted that the statute under which the claim was allowed followed the language of prior conventions between the United States and Mexico.

[76] The Brussels Intercustodial Agreement, *supra* note 49, in Annex Parts III and IV assures such reciprocal treatment and the sharing of the burden of meeting indebtedness by the countries involved. See Mason, *supra* note 60, at 181-182. The term "interest" in Parts III and IV was meant to be broad enough to include a creditor interest.

[77] The following discussion on corporations is applicable to firms or partnerships, which contrary to the view put forward in Part II F and G, are assimilated to juristic personalities and treated as enemy by vesting jurisdictions.

has been to seize and retain the entire assets of such corporation organized in their jurisdiction and it is this action which causes loss to the innocent non-enemy shareholder.

The vesting of all assets of enemy controlled corporations and corporations organized in enemy territory has been influenced by blocking controls to which these corporations were justifiably subject. The attitude has been sometimes justified on the basis of the supposed guilt of non-enemy nationals in associating as stockholders with enemy-to-be shareholders or just for investing as shareholders in corporations in enemy-to-be countries. Of course this justification is true only when it can be shown that the interests of the non-enemy shareholders were integral parts of a general scheme to cloak the existence of the enemy interests in contemplation of war, a scheme deliberately made at a time when war was probable or overt. Or it is alleged that the risk of war and of seizure as enemy is one of the risks a non-enemy corporate shareholder assumes when he invests in a corporation. Neither of these arguments is convincing and protection of these shareholders seems warranted.[78]

What are the international law precedents before World War II? Numerous instances exist where protection has been sought for a country's shareholders in a foreign corporation where some action against the property of that corporation has been taken by a foreign government.[79] However under Article 297b of the Versailles Treaty, the external assets belonging to German nationals or companies controlled by them could be seized. But, despite this provision, in several instances Allied countries took action according protection to property beneficially owned by Allied shareholders[80] while several Allied countries made a general turn back of a good part

[78] Hyde, *Protection by the United States of American-Owned Property in War-Stricken Areas*, 46 COL. L. REV. 519, 521-522 and n. 8 (1946); Mason, *supra* note 60, at 183-185; Cohn, *supra* note 23, at 542-551, and especially n. 54; Jones, *supra* note 50, at 254.

[79] See references, *supra* note 50. Kiesselbach, who was the German agent in the German American Claims Commission, mentions the numerous conventions made by the United States for such protection. KIESSELBACH, PROBLEMS OF THE GERMAN AMERICAN CLAIMS COMMISSION 75-76 (1930). One of these conventions was with Mexico. It was paralleled by conventions made by Mexico with Great Britain, France, Spain, Germany, and Italy which likewise protected shareholders of these countries. One difference was that the United States convention called for protection of any "substantial" interest while the European conventions required the interest to exceed 50 per cent of the total capital. A. H. FELLER, THE MEXICAN CLAIMS COMMISSION 1923-34 117 (1935). In 1941 the United States concluded a further convention with Mexico providing for Mexico to pay to the United States a lump sum amount. Congress then enacted legislation setting up an American-Mexican Claims Commission which passed, *inter alia*, on claims of American nationals for loss suffered to their property, including loss "suffered by any foreign corporation, company, association or partnership in which such nationals have, or had, a substantial and bona fide interest." See REPORT TO SEC'Y OF STATE, AMERICAN-MEXICAN CLAIMS COMMISSION 8 (1948). As stated before, the statute followed the language of earlier conventions.

[80] See references to certain instances in the dissenting opinion in the arbitration of the claim of the Standard Oil Company to Certain Tankers, 8 BRIT. Y. B. INT'L L. 156, 170 (1927). The arbitral tribunal permitted certain tankers owned by a wholly owned German subsidiary of Standard Oil to be turned over as reparations. Although literally correct if the principles of domestic corporate law were meant to be involved, the decision expresses a very questionable view of the intent of the provisions of the Treaty under discussion. In any event, the practice has been different after World War II, in accordance with Resolution 3, Annex, Paris Reparation Agreement, *supra* note 12, which calls for the exemption from reparation use of property of Allied nationals, whether "wholly owned or in the form of a shareholding of more than 48 per cent." See also comment, Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COL. L. REV. 1125, 1135 n. 31 (1948).

of the assets, thus eliminating or reducing harm to non-enemy stockholders.[81] Further, Article 297e of the Versailles Treaty and the Treaty of Berlin, which accorded the United States the rights of the Treaty of Versailles, incorporated the principle of protection for non-enemy shareholders, direct or indirect, of corporations organized in Germany with respect to corporate property damaged as a result of wartime action. Thus regarding American stockholders in American or foreign corporations whose property was destroyed, Umpire Parker of the United States-Germany Mixed Claims Commission had this noteworthy statement to make about the international law principal referred to under the Versailles Treaty:

> American nationals who had an interest in property destroyed and who suffered through its destruction, no matter in what capacity they suffered, whether directly or indirectly, are protected to the extent of their interest. *Thus construed, this clause of section 5 is in harmony with the established policy of the American Government to look behind forms and to the substance in discovering and protecting the interests of American nationals.* It did not have the effect of broadening the terms of the Treaty of Versailles, but was a declaration of a rule which the United States would have invoked in construing that treaty in the absence of any such express provision.[82] [Emphasis supplied.]

What is the situation with respect to the protection of non-enemy shareholders as to World War II? It may be helpful to divide the subject into the following sections.

1. *German External Assets.* As stated before, with respect to German external assets the Allies are pursuing generally a policy of vesting all property in the jurisdiction owned or controlled by German nationals, including as a German national any enterprise organized under German law. The Potsdam Agreement and the Paris Reparation Agreement which gave international sanction to seizures do not purport to define what may or may not be seized, the Potsdam Agreement merely speaking of "appropriate external assets"[83] and the Paris Reparation Agreement laying down a mandate that assets of a German enemy in the jurisdiction of a signatory should be disposed of to preclude return to "German ownership or control."[84] In both cases it was appreciated there was need of further clarification.

[81] Borchard, *Introduction*, to GATHINGS, INTERNATIONAL LAW AND AMERICAN TREATMENT OF ALIEN ENEMY PROPERTY IX (1940).

[82] CONSOLIDATED EDITION OF DECISIONS AND OPINIONS, *op. cit. supra* note 75, at 325, and similar statement, HYDE, *supra* note 78, at 522; Cohn, *supra* note 50, at 251-252. See also, Hanna, *Nationality and War Claims*, 45 COL. L. REV. 301, 327-328 (1945). The section 5 to which reference is made in the text was set forth in the Joint Resolution of the United States Congress declaring the end of the war with Germany and was also set forth and accepted by Germany in the Treaty of Berlin. The significant portion of section 5 is included in note 75, *supra*.

Art. 297b and Art. 297e of the Versailles Treaty may be considered as representative of the two streams of precedents in the international field, one of seizure of property owned or controlled by enemy nationals, the other of protection of non-enemy interests, there being a conflict and overlap in certain cases. International agreements, such as the Brussels Intercustodial Agreement, *supra* note 49, confirm the primacy of the principle of non-enemy protection in such cases.

[83] See note 5, *supra*. Mosely describes as part of a "feverish compromise" the division of German assets, *supra* note 7, at 229.

[84] See note 12, *supra*.

After the Potsdam Agreement the occupying powers in Germany passed Allied Control Council Law No. 5[85] which vested every conceivable and arguable type of German external asset and set up a German External Property Commission which was designed to define what was the property to remain seized. On the breakup of quadripartite government in Germany the GEPC became defunct. Under the Paris Reparation Agreement, Part I, Article 6F, a Committee of Experts was created which then discussed the question, *inter alia,* of the protection of friendly shareholders. After the discussion they recommended the calling of a conference to write a multilateral convention which would cover these and other subjects.[86]

(a) *Intercustodial Agreements.* A conference was called and this led eventually to the Brussels Intercustodial Agreement of December 5, 1947 which has been signed by the United States, Belgium, Canada, Denmark, Luxembourg, and the Netherlands and which became effective January 24, 1951.[87] Part III and Part IV of the Annex of this Agreement are important here. Part III concerns the case of property in one Allied country (secondary country) belonging to an enterprise organized under the laws of another Allied country (primary country), which enterprise is German enemy controlled. Instead of seizing all the property of the enterprise, provision is made for the secondary country to secure only that proportion of the property in its jurisdiction corresponding to the enemy interest while the part corresponding to the non-enemy interest is to enure to the benefit of such interest.[88]

[85] 14 DEP'T STATE BULL. 283 (1946).

[86] The Committee of Experts, while intercustodial discussions were taking place, formulated the Rules of Accounting, *supra* note 32, which permit a country to release non-enemy direct or indirect interests in German assets. See Rule 6 J and K and Rule 8 A.

[87] Agreement, *supra* note 49. For discussion of Agreement see Mason, *supra* note 60; Maurer and Simsarian, *supra* note 49; DIDISHEIM, LES CONFLITS INTERSEQUESTRES (I.A.R.A. 1949); Mann, *supra* note 56, at 245-247; Cohen, *German Enemy Property,* 3 INT'L LAW Q. 391, 396 (1950). This Agreement is the first comprehensive multilateral agreement on the subject of conflicting claims to enemy assets. These conflicting claims involve disputes between enemy property custodians of two Allied countries as to which is entitled to seize certain property, as well as certain disputes between an alien property custodian of one country and a non-enemy individual as to whether a certain property or interest should be considered as non-enemy. It is this latter kind of conflict which is relevant for this article.

The Agreement is open for accession to other members of the Inter-Allied Reparation Agency as well as under certain circumstances to non-members of the Inter-Allied Reparation Agency (Art. 5).

The Agreement failed to go into effect earlier because of the lack of Congressional authorization. This was given by Pub. L. No. 857, 81st Cong. 2d. Sess. (Sept. 28, 1950) which empowers the executive branch to enter into and give effect to agreements on conflicting claims to enemy property, provided such agreement, *inter alia,* provides for the protection of American and other non-enemy interests. H. R. REP. No. 2770, 81st Cong., 2d Sess., has instructive material on the background of the Agreement.

For entry into force of the Agreement and the related call for submission of claims, Dep't State Press Releases Nos. 92, 93, February 6, 1951. Press Release No. 92 erroneously gives February 1, 1951 as the effective date of the Agreement.

[88] The method by which this is to be done is generally by release of all the property by the secondary country to the primary country, the primary country then to reimburse the secondary country to the extent of the enemy interest in the released property. If release does take place, the non-enemy interests are automatically protected. In case, in certain circumstances, the secondary country seizes its proportion of the property corresponding to the enemy interests, precautions have to be taken that the residue enure only to the benefit of the non-enemy interest in the corporation, as returning it to the corporation will obviously not be adequate since the non-enemy interests will not be the sole beneficiaries of such an action. For discussion of cases under Parts III and IV of the Brussels Intercustodial Agreement see Maurer and Simsarian, *Agreement to Resolve Conflicting Claims to German Enemy Assets Outside Germany,* 42 AM. J. INT'L L. 157-162 (1948); Mason, *supra* note 60, at 179-185.

Part IV concerns property in an Allied country belonging to an enterprise organized under the laws of Germany, in which enterprise there is a 25 per cent shareholding of nationals of signatory countries.[89] In such a case the interests of the non-enemy nationals in such property were to be protected to the extent of such interests. It should be pointed out that the 25 per cent requirement was imposed not on the basis of principle but as a concession to administrative practicality.

Other intercustodial agreements have been made between Allied governments which are relevant.[90] The French and the British who participated in the discussions leading to the Brussels Intercustodial Agreement have thus far been unwilling to sign it, but entered into a bilateral agreement whose terms duplicated in great part the Brussels Intercustodial Agreement. This agreement contains a Part III which covers the same subject as the Part III of the Brussels Intercustodial Agreement. However, it permits seizure of the property by the secondary country where the enterprise in the primary country is German enemy controlled. The parties state they recognize such seizure may be prejudicial to the non-enemy interests in the enterprise but "express their willingness to enter into special agreements to mitigate the consequences."[91] This Agreement does not contain a Part IV dealing with enterprises organized under German law but the United Kingdom and France signed a contemporaneous declaration stating that each was willing to negotiate with other governments an agreement for the protection of "substantial" interests of non-enemy nationals in enterprises organized under German law with respect to "capital assets" of such enterprises outside Germany.[92] The Agreement and Declaration do not give the same protection to non-enemy interests as does the Brussels Intercustodial Agreement, although it is not known how the provisions of these documents have worked out in practice.[93] The United Kingdom-Netherlands Intercustodial Agreement has a Part III similar to the United Kingdom-France Part III but the Netherlands

[89] Annex, Arts. 21, 22. It will be noted that these articles are restricted to nationals as of 1939. The United States delegation attempted but was unable to secure a broader coverage. Under Pub. L. No. 857 of September 28, *supra* note 87, Congress authorized the executive in future agreements to seek protection for those non-citizens who were permanent residents at the time of this legislation and had become citizens at the time of the effective date of such agreement. Further, the Brussels Intercustodial Agreement does not shut the door to diplomatic representations for meritorious cases not covered. See Mason, *supra* note 60, at 185.

[90] In addition to the United Kingdom-France and United Kingdom-Netherlands Agreements discussed in the text, there appears to be a United Kingdom-Denmark Agreement which has not yet been published.

There was also an intercustodial agreement of limited scope entered into by the United States, the United Kingdom, and Canada in 1945, which has not yet been published. See Mason, *Settling Intercustodian Claims to Vested Property*, N. Y. Law Journal, May 23, 1950.

Several unpublished agreements have been made by the authorities in Germany with Allied countries which provide, *inter alia*, for the release by those countries of rolling stock in their territories owned by corporations in Germany in turn owned by Allied nationals.

[91] Annex, Art. 14 of the Agreement, *supra* note 60. There is at the end of Art. 14 an ambiguous sentence that discussions on protection of non-enemy interests shall be without prejudice to Arts. 12 and 13(a) which deal with seizures.

[92] See text of Declaration at end of United Kingdom-France Agreement, *supra* note 60.

[93] The British had been unwilling to accept a definite commitment of protection in the Brussels Intercustodial Agreement and this was one of the main reasons for their failure to participate therein.

secured significantly strengthened provisions for the protection of non-enemy share interests, so that the result may be the same as the Brussels Intercustodial Agreement Part III. Thus the Agreement recognizes that seizures may be prejudicial to non-enemy interests but goes on to state that a government shall only be entitled to the enemy interests and that the Agreement shall be carried out in such a way as to avoid harming non-enemy interests.[94] With respect to non-enemy interests, the Agreement contains as its last provision, Article 26, which is almost identical in wording with the United Kingdom-France Declaration, except that the Parties affirm their willingness to negotiate with each other. The form of the Article appears to make it more of a commitment than the Declaration.

(b) *Neutral Accords.* The general effect of the Allied-Swiss Accord, the Allied-Swedish Accord, the Allied-Spanish Accord, as far as relevant here, is to permit the seizure by the countries of property in their territory which is owned by corporations organized under German law or by German controlled corporations.[95] However the Swiss-Allied Accord has a special clause which provides for exemption of property of enterprises organized under German law which are controlled by non-German nationals, and even in the case where property is permitted to be seized, protection shall be afforded to substantial interests of non-German nationals which would otherwise be injured.[96] The particular language involved is subject to controversy but it is considered that this clause requires protection for cases involving substantial non-enemy interests, say, 25 per cent or more. However, this and other matters have been the subject of a tentative agreement between the United States and Switzerland on conflicting claims to German assets of July 19, 1949. This agreement has not become effective and has not been published. It is understood that the Swiss have reached agreements of an intercustodial nature, in a tentative or final form, with Great Britain, France, the Netherlands, Denmark, and Norway. With relation to Sweden and Spain no clause exists for the protection of non-enemy nationals but provision was inserted that permitted these countries to extend protection to their own nationals owning interests through foreign corporations and then to extend the same protection to nationals of other non-enemy countries.[97] This was designed to supply an opening for later approaches to these countries for the protection of such interests. The United States Government did in fact have discussions with the Swedish custodian in 1948 which, however, did not materialize in any agreement. Further discussions are planned.[98]

[94] Arts. 14, 19 of the Agreement, *supra* note 60.

[95] See references note 26, *supra*, plus Arts. I and II of Allied-Spanish Accord. The Swiss Accord covers "property owned or controlled"; the Swedish Accord, "owned or controlled, directly or indirectly"; the Spanish Accord covers property "belonging to." Some question may exist in the Spanish Accord about the power to seize property indirectly owned and property controlled by the Germans.

[96] Annex, Article IV B, Allied-Swiss Accord, *supra* note 26.

[97] Allied-Swedish Accord, *supra* note 26, at 17; Allied-Spanish Accord, *supra* note 26, at 53. These provisions refer to protection of direct or indirect non-enemy interests, to the same extent as Swedish (Spanish) nationals, on condition of reciprocity by the country of the non-enemy. *Cf.* Mann, *supra* note 56, at 250.

[98] It is understood that the British and Swedish custodians have reached an agreement, but this has not yet been published. It is also understood that the Netherlands and Sweden reached an agreement November 14, 1950.

(c) *Agreement with Italy.* The Memorandum of Understanding of the United States, United Kingdom, and France with Italy dated August 14, 1947 provides for the liquidation of assets in Italy belonging directly or indirectly to Germans in Germany or organizations organized under German law. But there is a provision exempting assets of such organizations to the extent that they are not "beneficially German-owned."[99] Thus there is assured complete protection for indirect non-enemy share interests.[100] This is consistent with Article 78, paragraph 1, of the Italian Treaty which calls for the restoration of all United Nations nationals' interests[101] in Italy, and especially paragraph 4(b) which provides for the protection of shareholdings, direct or indirect, of United Nations nationals in German entities having property in Italy.[102]

(d) *Agreements with U.S.S.R.* Under the Potsdam Agreement and the Peace Treaties with Bulgaria, Hungary, Rumania, and Finland, the U.S.S.R. was entitled to appropriate German external assets in these countries or, as further defined by the Peace Treaties, German assets transferred by the Allied Control Council, Germany.[103] An attempt was made by the Western Powers in the German External Property Commission, a quadripartite agency in Germany, to define what the U.S.S.R. was entitled to. One of the proposals made was that non-enemy direct or indirect interests in these assets should be protected. The GEPC, as stated before, became defunct with the collapse of quadripartite government in Germany and this proposal came to nought. The U.S.S.R. has pursued a policy of securing the transfer to itself from the satellite countries of the German assets, including therein assets owned directly or indirectly by entities organized under German law, regardless of whether these entities were owned by non-enemy nationals. The Western Powers have objected to this action by the U.S.S.R. Thus the United States transmitted a note to the U.S.S.R. stating:[104] "As a general principle, beneficial rights of United Nations countries in any German assets are not to be transferred." The objection can be supported by reference to the Armistice terms with the enemy countries which provided for the restoration of United Nations nationals' interests;[105]

[99] See paragraph 2 of Memorandum, *supra* note 9.

[100] Mann, *supra* note 56, at 253, reaches a different conclusion, relying too heavily on the literalism of the *Standard Oil Company Tankers* case, *supra* note 80. The word "beneficially" was intended to secure protection for non-enemy shareholders in German corporations and the Memorandum has been implemented in that sense. See use of word "beneficial" in par. 4(b), Art. 78, Italian Treaty.

[101] It may be argued that this paragraph refers to "legal" interests. However, in international law the concern of a shareholder with the safety of the corporate property is so clearly recognized as a protectible interest, that there is no real doubt that this paragraph should be applied to cover the shareholder's interest. *Cf.* use of "interests" in pars. 3 and 4(b) of the same article.

[102] If the Memorandum did not exempt from seizure such non-enemy beneficially owned assets, the illogical result would follow that a partly damaged building in Italy (owned by a German corporation, in turn owned by American nationals) would be seized as a German asset and lost to the stockholders, while the stockholders received compensation for the damaged part under par. 4(b).

[103] See references notes 5 and 6, *supra.*

[104] The text of the note is given in 17 DEP'T STATE BULL. 298 (1947). It is understood similar notes were delivered by the French and British.

[105] *E.g.*, par. 13 of Rumanian Armistice, 11 DEP'T STATE BULL. 289 (1944).

Article XX and Annex II of the Potsdam Agreement which provide that the burden of reparations should not fall on Allied nationals;[106] the provisions of the treaties providing for the restoration and protection of United Nations nationals' interests, direct and indirect;[107] as well as the point that the U.S.S.R. is entitled only to what is transferred by the Allied Control Council, which has not acted. The dispute remains one of the unsettled issues with the Soviet Government. In view of the fact that the countries concerned transferred the assets without awaiting an ACC order, it may be possible to pursue them for indemnity.

(e) *London Patent Accord.* In the field of German assets mention should be made of the London Patent Accord of July 27, 1946[108] under which the Allied countries which have seized German patents in their jurisdiction have agreed to license them out on a non-exclusive, royalty free basis or to put the patents into the public domain. However this obligation only pertains to patents which are 100 per cent German owned. Where the patent is less than completely German owned, the only compulsion is that, in so far as a country may act with respect to such patents, it shall accord the same privileges to nationals of other countries.[109] With respect to patents belonging indirectly to non-enemy interests and with respect to which action has not been taken under the London Patent Accord, provision exists in the Brussels Intercustodial Agreement for handling them similarly to any other kind of property.[110] This would mean that non-enemy interests would be protected.

2. *Italian, Bulgarian, Hungarian, and Rumanian External Assets.* These assets are covered by almost identical articles in the Peace Treaties. These clauses permit, subject to certain enumerated exceptions, the seizure and retention of the "property, rights and interests" which "belong" to the enemy government and its nationals,"[111] by the Allied countries in which the assets are. What is the disposition of the external property of corporations organized under enemy laws, but which are owned wholly or in part by Allied shareholders? The detailed nature of the Article in each of the Peace Treaties may be argued to show that the whole subject was meant to be completely covered, leaving no room for further exceptions or qualifications.[112]

[106] Paragraph 2 of the Annex states that this principle applies to property wholly or substantially owned by Allied nationals; if the Allied interest is less than substantial, compensation is expected.

[107] *E.g.*, Art. 26, par. 1 and par. 4(b) of the Hungarian Treaty which are identical with the provisions in the Italian Treaty discussed in the text in c above and in notes 101 and 102 *supra*. See also Mann, *supra* note 56, at 241-242. It should be pointed out that at one stage of the Austrian Treaty discussions, representatives of the three Western Powers examined with the U.S.S.R., *inter alia*, the direct and indirect non-enemy interests in properties in Eastern Austria but could not secure Russian acceptance that beneficial interests of Allied nationals were to be excluded from appropriate German external assets under Potsdam.

[108] See text in 15 DEP'T STATE BULL. 300 (1946); Boskey, *The Conference on German-Owned Patents*, 15 DEP'T STATE BULL. 297 (1946).

[109] See Arts. 1 and 2.

[110] Annex, Art. 26 I of Agreement, *supra* note 49.

[111] See references notes 17, 19, *supra*.

[112] In this sense the problem may be claimed to be different from that of the construction of "German assets" which the U.S.S.R. obtained in Bulgaria, Hungary, and Rumania and the Allies obtained in Italy, discussed in the text.

On the other hand it can be argued that these very shareholders are protected under the other clauses of the Treaties dealing with the restoration of the rights of Allied nationals or compensation for any damage done to their property;[113] that these clauses should be integrated with the present clauses; and that the present clauses merely confirm the right of the Allies to vest *vis-a-vis* the Italian Government, but were not meant to and do not affect the ability of any Allied country *vis-a-vis* another Allied country to make claims on behalf of citizens who may be the owners in whole or part of the corporations organized in enemy territory. It does not seem inappropriate to say that the protection of such non-enemy nationals is not to be foreclosed but the subject of further discussions.[114]

The special provision in the Italian Peace Treaty under which the U.S.S.R. is entitled to Italian assets in the Balkans[115] leaves an uncertainty similar to, but not as complete as, the clause giving the U.S.S.R. German assets. It is not as complete since there is the incorporation of the exceptions in Article 79. But there still remains the question, discussed above with respect to Article 79, of how much of Article 78, dealing with the protection of the United Nations nationals, is to be integrated with it. Should external assets in the Balkans of corporations in Italy owned by United Nations nationals be considered Italian assets for seizure by the U.S.S.R.?

3. *Special Nationalization Agreements.* In addition to special agreements on enemy assets, many countries have made general nationalization claims settlements with the eastern European countries and such settlements have contained provisions which may cover the protection of the non-enemy interests in German assets.[116] The United States made an agreement with Yugoslavia,[117] initialed an agreement with Poland which never was put into effect,[118] and has carried on discussions thus far unsuccessfully with Czechoslovakia.[119] The British, French, and Swiss have each made agreements with one or more of Yugoslavia, Poland, and Czechoslovakia.[120] In

[113] See notes 101, 102, 107, *supra*, and corresponding text. In addition there is the clause which exists in all the treaties, *e.g.*, par. 9(a), Art. 78, Italian Treaty, defining as a United Nations national all corporations treated as enemy by the enemy country. Are such corporations though owned wholly by Allied shareholders subject to the seizure of assets which they hold outside of the enemy country?

It is also possible to make the argument that "belong" connotes beneficial ownership, just as it will doubtless be interpreted to include "direct or indirect." See note 57, *supra*.

[114] This has been the attitude of the United States Government. Thus the United States has expressed a willingness to release the beneficial interests of non-enemy nationals in cases involving Bulgarian, Hungarian, and Rumanian external assets, if reciprocal treatment is accorded American nationals. Cases have come up, involving United States and British nationals and assets in the United States and Great Britain, which it is hoped may be settled by future negotiation.

[115] Art. 74, Pt. A, par. 2(b).

[116] The nationalization laws often covered German assets. See generally, Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COL. L. REV. 1125 (1948); Doman, *Compensation for Nationalised Property in Postwar Europe*, 3 INT'L L. Q. 323 (1950); Rubin, *Nationalization and Compensation: A Comparative Approach*, 17 U. OF CHI. L. REV. 458 (1950).

[117] UNITED STATES-YUGOSLAVIA AGREEMENT REGARDING PECUNIARY CLAIMS OF THE UNITED STATES AND ITS NATIONALS OF JULY 19, 1948, T.I.A.S. 1803.

[118] Dep't State Press Release No. 935 of December 27, 1946, 16 DEP'T STATE BULL. 28 (1947).

[119] The Czechs in 1946 gave a general assurance of compensation, 15 DEP'T STATE BULL. 1004 (1946). In 1949 a Czech delegation arrived to carry on discussions, but its chief defected on arrival and assumed the status of a political refugee, so that negotiations were not undertaken.

addition, Switzerland has made an agreement with Hungary.[121] The United States-Yugoslav Agreement provides for protection of direct or indirect interests of United States nationals and was designed to cover assets seized in Yugoslavia belonging to German organized corporations.[122] Payment of such claims is to be made out of a 17 million dollar fund by the United States International Claims Commission, any residue after the satisfaction of all claims to revert to Yugoslavia. In the United States-Polish agreement provision was made for protection of United States interests in assets in Poland owned through corporations organized under the laws of Germany where the American interests constituted 51 per cent of the voting stock, or if less, were "directed to the control of the enterprise, as evidenced by participation in the management."[123]

It has not been possible to examine all the nationalization agreements but a sampling appears to show protection of indirect interests apparently going through even enemy intermediate corporations.[124]

4. *Extent of Protection of Shareholders and Creditors.* One further problem should be considered with respect to the protection of non-enemy shareholders. What should be the extent of the protection? The simple rule that suggests itself is to assure protection according to the proportion that the non-enemy shares bear to the total shareholdings. This simple rule seems to have been generally adopted in many situations.[125] However, on several occasions objection has been raised that account must be taken of the creditor interest, since of course stockholders on a liquidation are entitled to protection only after the payment of debts, so that payment to them without regard to the obligations of the enterprise may give them a windfall.[126] It is possible that a creditor may pursue such a stockholder as being unjustly enriched. But the main obstacle has been the impracticality or difficulty of taking into account the creditor factor, and instances of previous solutions incorporated in international agreements or in decisions of international arbitral tri-

[120] See Doman, articles, note 116, *supra*.

[121] Reported State Dep't in unclassified despatch 169 of August 28, 1950 from Bern.

[122] See Art. 2(C) of Agreement, *supra* note 117. The agreement speaks of "property, and rights and interests in and with respect to property" "indirectly" owned by United States nationals through interests, direct or indirect, in non-United States juridical persons.

[123] Art. II B of Agreement, *supra* note 118.

[124] *E.g.*, Art. I of the British-Czech Agreement on Nationalization Claims, Treaty Ser. No. 60 (1949), CMD. 7797, states that the agreement applies to "property, rights and interests. . . . owned directly or indirectly, in whole or in part, and whether legally or beneficially" by British nationals. Art. 2 of the Swiss-Hungarian Agreement of June 27, 1950, referred to in note 121 *supra*, states that the Agreement covers all property, rights, interests, and claims, belonging directly or indirectly to Swiss natural persons or Swiss juridical persons, in which the controlling interest is owned by Swiss nationals.

[125] FREDERICK K. NIELSEN, INTERNATIONAL LAW APPLIED TO RECLAMATIONS 58-61 (1933); 3 MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1683 (1943); 2 HYDE, *op. cit. supra* note 49, at 903-904; see GREAT BRITAIN-MEXICAN CLAIMS COMMISSION, FURTHER DECISIONS AND OPINIONS 203 (1933).

[126] FELLER, *op. cit. supra* note 79, at 120-121; Kiesselbach, *op. cit. supra* note 79, at 118-120, 126. The principles laid down for the United States-German Mixed Claims Commission included protection of creditors. See note 75, *supra*.

bunals seem to rest[127] on a strict share basis.[128] One way may be to ignore creditor interests unless the other assets of the corporation are inadequate to meet debts. If they are adequate it is only the shareholder that should be protected as his equity is being affected. If the shareholder has no equity, it would appear that only the creditor should be compensated.[129] Another possibility, even if the enterprise is solvent, is to make a paper liquidation and figure out the proportionate interests of shareholders and creditors in any particular enemy assets.[130] The problem is a thorny one offering several solutions, none of which is completely satisfactory. The problem was in the minds of those who worked out the Brussels Intercustodial Agreement and interesting questions will doubtless arise in settling the cases under this agreement.

H. Restitution

Although the general problem of restitution is treated elsewhere in this symposium there are some special ramifications in connection with enemy external assets.

By the London Declaration of January 5, 1943 against Acts of Dispossession[131] the Allies stated that they reserved their right to declare invalid acts of looting practiced by the Germans in occupied territory by force, duress, or other more subtle means. For those cases of looting where property was located in Germany at the end of the war, there exist procedures for securing restitution directly from the three Western Powers or by suit under the restitution laws applicable in the three western zones.[132] For cases where the property has remained outside of Germany and has become the property of another non-enemy national, laws have been enacted in the various occupied countries attempting generally to restitute to the original owners.[133]

[127] KIESSELBACH, *op. cit. supra* note 79, at 126. Jones, *supra* note 50, at 246-247, 252, 257.

[128] See *e.g.*, REPORT TO SEC'Y OF STATE, AMERICAN-MEXICAN CLAIMS COMMISSION, *op. cit. supra* note 75, at 500, 523, 560, 610, 638, 649. In the case of a bank, one decision gave a recovery dependent on the impairment of the share value (p. 129). See references notes 125-127, *supra*.

[129] *Id.* at 546. See note 75, *supra*.

[130] See possible formula in Mason, *supra* note 60, at 182, 181; for cases without creditor interests, see Maurer and Simsarian, *supra* note 88, at 158-162.

[131] The text is set forth in UNITED STATES ECONOMIC POLICY TOWARD GERMANY, DEP'T STATE PUB. No. 2630, at 52.

Although this declaration applied to territory outside of Germany the Allies have also adopted as their policy the restitution of property taken away from individuals in Germany; Military Government Law 59 in the United States Zone and similar laws in the British and French Zones.

[132] The three western zones have procedures for restitution of identifiable items to countries of origin if it appears that they were acquired by Germans other than by "normal commercial transfer."

[133] See series of articles in 29, 30 and 31 J. COMP. LEG. AND INT'L L. (3rd Ser., Parts III and IV, 1947, 1948 and 1949) on Burma, Philippines, Greece, France, Denmark, Norway, Isle of Jersey, Belgium, Netherlands.

No such laws exist in the United States, but the common law might ordinarily be effective where force or duress had been employed. However, in one case which came to the State Department's attention, involving property in the United States where the court appeared to debar itself from questioning an act of looting in Germany on the basis of the "act of state" doctrine, in the absence of a clear expression of State Department policy, the State Department communicated with the court informing the court that it was this Government's policy to oppose Nazi looting and to permit the courts to pass upon the validity of the acts of Nazi officials. The matter came up in the case of Bernstein v. Holland-America Line. The letter is set forth in 20 DEP'T STATE BULL. 592 (1949). The letter is also referred to in 44 AM. J. INT'L L. 132, 183 (1950).

Where the property remained outside of Germany but as the property of a German national there arose the possibility that it might be seized as a German external asset. The most dramatic instance of this occurred in the Austrian Treaty discussions where the U.S.S.R. engaged in a sharp controversy with the Western Powers, refusing to recognize that looted assets do not fall within the scope of the "appropriate German external assets" to which it was entitled under the Potsdam Agreement.[134] In the United States under the Trading with the Enemy Act and the certification letters of assurances regarding blocked assets, properties seized from victims of Nazi persecution or in violation of the declaration against forced transfers may be released to the original owners.[135] Similarly in the Brussels Intercustodial Agreement no country is required to recognize loot transactions in conflict with the London Declaration.[136]

The matter of looted property involved in German external assets came up in the drafting of the Inter-Allied Reparation Agency Accounting Rules. It was finally agreed that a country need not account for property as an enemy asset if it had been originally looted,[137] thus leaving any particular country in a position to make restitution without being prejudiced accountingwise. During the course of the discussion the Netherlands, supported by other occupied countries, insisted that lootings which had taken place through the indirect means of forced loans, removing foreign exchange barriers, excessive occupation costs, and unbalanced clearings imposed by the Germans must be considered on a par with lootings by ordinary force or duress. This was generally agreed upon, however, without prejudice to the position that a country might take with respect to property which has come from such a jurisdiction to its own jurisdiction.[138]

IV

CONCLUSION

The reasons that vesting action has often brought harm to friends are several. Thus, the domestic laws under which seizures have taken place are unusually broad in their scope in order to deal with the many devices by which enemy interests may be represented. Their functions as to enemy national and enemy property served

[134] Mosely, *supra* note 7, at 229-230.

[135] Cf. generally sec. 32(a)(2) of the Trading with the Enemy Act, 61 STAT. 754, 756 (1947), 50 U. S. C. App. §32(a)(2) (Supp. 1950). See Alk and Moskovitz, *supra* note 24, at 17-19; Cohn, *supra* note 40, at 62-69, 75, and n. 83.

[136] Annex, Art. 27 of Agreement, *supra* note 49.

[137] Rules 11-15 of Accounting Rules, *supra* note 32; Simsarian, *supra* note 32, at 229.

[138] This reservation was included in the second paragraph of the Commentary on the Rules of Accounting. This Commentary was also approved by the Assembly of IARA on November 21, 1947. Both Rules and Commentary may be found in document IARA/A.S./ Doc. 354 of November 18, 1947.

The countries were fearful that on the Dutch theory all purchases from the Netherlands during the war might be involved and that excessive claims might be made for restitution of goods which had left the Netherlands and had gone into Germany and other territories. There was an argument, too, that this kind of looting by government of government might more properly be made a governmental claim for consideration in any peace settlement. The situation might have one more element of difficulty if the property had come into the hands of a non-enemy national.

well in the era of economic warfare when blocking controls had to be extensive. But their strict application after the cessation of hostilities, when there is time for separating friend from foe or using various devices (legislative amendments, international agreements, etc.) to prevent loss to non-enemy interests, would seem inappropriate. Part of the fault lies, not so much in the lack of refinement of legislation, but in the complexity and richness of the modern system of interests in property which resists and overflows the categories described by legislation. With relation to international treaties and agreements, the impact is also apt to be harsh since the treaties and agreements often use broad terms or only lay down broad policies. This may result from a lack of time for detailed analysis, from difficult bargaining and compromise which show up in the ambiguity of language and intention, or because parties consider the formulation to be only an interim one, to be supplemented by further agreements later on. Further there is a tendency of governments to maximize reparations by vesting on any plausible ground, ignoring the harm to non-enemies unless their own citizens are apt to be affected in similar cases in other countries, and to shift to other jurisdictions, if possible, the duty of remedying the loss involved. In some cases, too, the content of protectible interests in law has been too rigidly restricted and has not taken into account the fact of loss to the persons concerned.

The goal of policy in the present field should be, colloquially speaking, to determine who are *really* non-enemies and to exempt from seizure property, rights, or interests which are *really* theirs.[138] In labeling what is a property, right, or interest for this purpose the legal conclusions should approximate the economic reality: will the seizure result in economic loss to the non-enemy? The law may attach the limitation that the loss should be proximate and substantial. Legitimate government policy may restrict protection to the range of administrative practicality and make it subject to conditions of reciprocity and equal sharing of burdens among the countries concerned. But these should be about all the qualifications to the principle of protection and these qualifications should not be used to emasculate the principle that non-enemies should not suffer loss from the seizure of enemy property.

For the future, in areas not yet filled, the need is for laws and international agreements which better effectuate the policy of protection. This may, however, as in the past, be a counsel of perfection which ignores the hurly-burly struggle often involved in the adoption of internal legislation and international agreement, when the outcome is not the same as what might be produced in Olympian detachment. For a good part of the enemy external assets field there already are basic texts. It rests with governments of good will not to stick on the letter but to interpret liberally or to agree to modification of letter to conform with the principle of protection. In some cases, the matter may become one for international arbitral or judicial cognizance. It will often then be for the tribunal concerned to engage in that form of judicial legislation which fills in interstices and harmonizes a discordant text. The principle of non-enemy protection should serve as a guiding beacon in this labor.

[138] Martin, *supra* note 3, at 90; Cohn, *supra* note 23, at 542-551 and n. 54; Jones, *supra* note 50, at 254.

PROBLEMS OF THE ITALIAN PEACE TREATY: ANALYSIS OF CLAIMS PROVISIONS AND DESCRIPTION OF ENFORCEMENT

WALTER STERLING SURREY*

"An Agreement on an Agreement on an Agreement."[1]

The Allied and Associated Powers and Italy "desirous of concluding a treaty of peace which, in conformity with the principles of justice, will *settle*[2] questions still outstanding . . . have therefore agreed to declare the cessation of the state of war and for this purpose to conclude the present Treaty of Peace . . ."[3] (February 10, 1947).

"As an integral part of the measures which are now being taken to *restore*[4] normal financial and economic relations between our countries . . . the Government of the United States of America and the Government of Italy have reached an understanding providing for mutual renunciation of claims and for related agreements . . ."[5] (August 14, 1947).

"The Embassy of the United States of America . . . has the honor to refer to previous correspondence . . . and to conversations . . . *with regard to the desirability of clarifying the meanings of the phrases in the Memorandum of Understanding. . .*[6] [August 14, 1947]. If the Government of Italy is prepared to give its approval to the foregoing agreement 'clarifying the meaning of phrases' in the Memorandum of Understanding . . . [this] agreement *shall be considered as having entered into effect*[7] as of the date . . ." of such approval (February 24, 1949).[8]

I

INTRODUCTION

With all the good will on both sides, a settlement of economic issues and, in particular, claims by a victorious state on behalf of itself and its nationals against a defeated state, are not easily resolved in principle nor expeditiously executed in

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[1] With apologies to Gertrude Stein.

[2] Italics supplied.

[3] Treaty of Peace with Italy signed at Paris, February 10, 1947. 61 STAT. 1245, 80th Cong., 1st Sess. (1947).

[4] Italics supplied.

[5] Memorandum of Understanding Between the Government of the United States of America and the Government of Italy Regarding Settlement of Certain Wartime Claims and Related Matters, signed at Washington, August 14, 1947.

[6] Italics supplied.

[7] *Ibid.*

[8] Note verbal from the Embassy of the United States of America to the Ministry of Foreign Affairs, Italy, February 24, 1949. The Government of Italy accepted the proposals in a note of the same date, addressed to the United States Embassy at Rome.

practice. United States-Italian relations, since Italy's unconditional surrender and assumption of a somewhat novel co-belligerency status with the Allies in the fall of 1943, have, on the whole, been very good. Negotiations between the two countries on the settlement of claims against Italy have from the days of the negotiations on the Treaty of Peace been more than amicable and friendly. But amicable and friendly negotiations, and successive agreements designed to settle claims issues once and for all, cannot be cashed in the bank by United States claimants.

It is my purpose in examining into the question of claims held by the United States and its nationals against Italy, to determine what has been agreed upon in the various successive "final" agreements, to review how these agreements have been executed, and perhaps thereby to be able to draw some conclusions as to possible procedures which may temper the views of some claimants that the problem is one consigned to the ages.

In the negotiations of the Italian Treaty of Peace, the United States sought to insure that the terms imposed on Italy by way of reparations would not be so onerous as to retard Italy's reestablishment of sound economic conditions and healthy relations with the other members of the family of nations. At the same time, the United States sought to assure that United States nationals, who had justified claims against Italy arising out of the war, would be protected in the satisfaction of those claims. Thus the United States, together with most other signatories, sought no reparations for its own national treasury, as distinguished from satisfaction of justified claims of its nationals for the benefit of their individual pockets.

Accordingly, reparations primarily from industrial equipment designed for the manufacture of war material, and from current production, to be paid over a maximum period of seven years, were provided only for the Soviet Union (to the tune of $100,000,000),[9] Albania ($5,000,000),[10] Ethiopia ($25,000,000),[11] Greece ($105,000,000),[12] and Yugoslavia ($125,000,000).[13]

The United States, together with most of the Allied and Associated Powers, restricted its claims to two categories: first, utilization of Italian assets within the United States to the extent, and only to the extent, necessary for the satisfaction of its claims and those of its nationals, other than claims fully satisfied under other Articles of the Treaty;[14] and second, claims for the return of United States property, and property of its nationals, located in Italy, or where such property could not be returned, or where, as a result of the war, a United States national suffered a loss by reason of injury or damage to his property in Italy, compensation in lire to the extent of two-thirds of the amount necessary, as of the date of payment, to purchase similar property or to make good the loss suffered.[15]

[9] Treaty of Peace with Italy, Part VI, Section I, Article 74, paragraph A, sub-paragraph 1.
[10] Treaty of Peace with Italy, Part VI, Section I, Article 74, paragraph B, sub-paragraph 1.
[11] *Ibid.* [12] *Ibid.* [13] *Ibid.*
[14] Treaty of Peace with Italy, Part VII, Section II, Article 79, paragraph 1.
[15] Treaty of Peace with Italy, Part VII, Section I, Article 78. The question of the return of property by Italy from the territory of any of the United Nations is not dealt with here. It is covered by Section II, Article 75 of the Treaty of Peace with Italy.

II

ITALIAN ASSETS IN THE UNITED STATES

Article 79 of the Treaty provides certain basic rules for the utilization of Italian assets in the United States.

First, it gives the United States[16] the right to retain and deal with in any manner all property in the United States of Italy and its nationals, as of the date of the coming into force of the Treaty, to the extent such property is required for the settlement of claims of the United States and its nationals against Italy and Italian nationals.[17]

Second, any amount in excess of the amount of such claims is to be returned to Italy.[18]

Third, United States law is to govern the liquidation or disposition of Italian property in the United States and the rights of the Italian owners in such property.[19]

Fourth, Italian industrial property in the United States need not be returned nor counted in the calculation of the amounts of Italian property which can be retained by the United States.[20]

Fifth, excluded from property which may be retained is any property of the Italian Government used for consular or diplomatic purposes;[21] property belonging to religious or private charitable institutions where used exclusively for religious or charitable purposes;[22] property of natural persons of Italian nationality permitted to reside in the United States or in other United Nations;[23] property rights arising since the resumption of trade and financial relations between Italy and the United States;[24] and literary and artistic property rights.[25]

Sixth, the Italian Government undertakes to compensate Italian nationals whose property is taken.[26]

Both prior to and subsequent to the signing of the Treaty of Peace, the United States made substantial contributions to the relief of Italians. By its contributions to UNRRA, by civilian supplies furnished under a military relief program, as well as by contributions through private channels, aid from the United States constituted an important factor in assisting the Italian relief and recovery programs. Our official policy was designed to afford Italy an opportunity to set up a free democratic

[16] These rights are, of course given to all of the Allied and Associated Powers. These are listed in the first introductory paragraph to the Treaty as follows: "The Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America, China, France, Australia, Belgium, the Byelorussian Soviet Socialist Republic, Brazil, Canada, Czechoslovakia, Ethiopia, Greece, India, the Netherlands, New Zealand, Poland, the Ukrainian Soviet Socialist Republic, the Union of South Africa, and the People's Federal Republic of Yugoslavia."

[17] Treaty of Peace with Italy, Part VII, Section II, Article 79, paragraph 1.

[18] *Ibid.*

[19] Treaty of Peace with Italy, Part VII, Section II, Article 79, paragraph 2.

[20] Treaty of Peace with Italy, Part VII, Section II, Article 79, paragraph 4.

[21] Treaty of Peace with Italy, Part VII, Section II, Article 79, paragraph 6, sub-paragraph (a).

[22] *Id.*, sub-paragraph (b).

[23] *Id.*, sub-paragraph (c).

[24] *Id.*, sub-paragraph (d).

[25] *Id.*, sub-paragraph (e).

[26] Treaty of Peace with Italy, Part VII, Section II, Article 79, paragraph 6, sub-paragraph 3.

system of government. We recognized that chaos, hunger, and desperation, while a barren soil for the birth of a democratic system of government, were admirably suited for the quick growth of a dictatorship, including a communist dictatorship. Thus, our policy was to provide dollar aid wherever the furnishing of such aid was possible.

One possible source of funds clearly concerned Italian vested and blocked property in the United States. At the time of the signing of the Treaty of Peace, there was in the United States approximately $15,800,000 of vested Italian property,[27] and $50,000,000 of blocked Italian property.[28] If a way could be found to ascertain the amount of legitimate claims of United States nationals against Italy which could be satisfied out of such funds, the United States was prepared to waive its governmental claims against such assets, and return the balance to Italy. The claims of United States nationals to be satisfied from Italian assets fell primarily into two categories: (a) personal injury claims, such as for maltreatment of members of the armed forces while prisoners of war in Italy, or maltreatment of United States civilians during the war by Italians; and (b) claims for damages caused by Italians to property owned by United States nationals, or to property in which such nationals had an interest, where the property was located outside of Italy.

Not surprisingly, attempts by the armed services and the State Department to secure information from potential claimants did not reveal even enough information to calculate intelligently the probable size of such claims. Two courses of action were available. First, the United States could set a time limit for the filing of such claims by its nationals; it could then satisfy all of such claims so filed and determined to be valid out of Italian assets in the United States, returning the balance of the assets to Italy. This course of action gave rise to certain fundamental objections, both with respect to our domestic policy as well as our foreign policy. The Treaty had provided no time limit for satisfying claims out of Italian assets in the United States. For the United States executive branch to impose any but a rather lengthy period of time during which claims might be filed would have resulted in working injustices against legitimate claimants. On the other hand, the need for dollars by Italy was an immediate one, and of critical importance to the future political destiny of Italy and the free world.

The executive branch therefore decided to follow a second course of action. It determined to retain a certain amount of the assets, estimated to be adequate for satisfying legitimate claims, and to return the balance to Italy immediately. On further examination, it was subsequently determined to be administratively easier to return all vested and blocked assets to Italy, with certain exceptions, but provide for

[27] This figure is an approximation made from certain records of the United States Government. Approximately 8 1/29 million dollars of vested property has been refunded.

[28] This is a very general estimate. The greater percentage has been returned through a procedure whereby the Italian authorities certify to the holding banks that unblocking is within the terms of the unblocking agreement between the two countries. No official record of the amount unblocked is available to the Governments.

Italian payment of dollars to the United States. This was accomplished in the "Memorandum of Understanding Between the Government of the United States and the Government of Italy Regarding Italian Assets in the United States of America and Certain Claims of United States Nationals,"[29] signed and entered into force on August 14, 1947. Under this agreement, the United States agreed to effect the return of vested Italian assets under the Trading with the Enemy Act, and to release blocked Italian property.[30] Italy, on its behalf, agreed to pay $5,000,000 in United States dollars, on or before December 31, 1947, to be utilized "in such manner as the Government of the United States of America may deem appropriate, in application of the claims of United States nationals arising out of the war with Italy and not otherwise provided for."[31]

This method for settling the claims is a very satisfactory one. The legitimacy of the claims of United States nationals is determined by their own government. This is certainly preferable, in so far as such nationals are concerned, to leaving them to deal with a foreign government, where language differences, varying legal systems, and mere physical distances involved are almost certain to complicate and harass the claimant. Moreover, it eliminates the claims issue as a potential source of dispute between the two governments. It is also likely to be preferable, from the claimants' viewpoint, to adjudication by an international tribunal. Procedures before such a body are always likely to be more complicated, more expensive, and time consuming.

This method of settlement is particularly advantageous in those cases where the relations between the two governments are not of the best, as witness the settlement reached with Yugoslavia with respect to payment for expropriation of property in Yugoslavia owned by United States nationals, or in which such nationals had an interest.[32]

[29] This memorandum was one of the two memoranda which, together with annexes, constituted the agreement reached between the United States of America and Italy on financial and economic problems arising out of the Treaty of Peace. The entire agreement is commonly referred to as the "Lombardo Agreement" after the Italian negotiator, Ivan Matteo Lombardo. For convenience sake the memorandum here referred to, dealing with Italian assets in the United States, shall be referred to as Memorandum of Understanding I.

[30] Memorandum of Understanding I, Article I, paragraphs 1 (a) and 1 (b). The United States was not required to return assets: (1) belonging to the Italian Fascist Party, any closely affiliated organization, or any person who was a member of such party or organization after September 8, 1943; (2) any person, firm, or organization convicted of violating any of the statutes set forth in section 34 (a) of the Trading with the Enemy Act; (3) any person, firm or organization convicted of war crimes or of having collaborated with an enemy country after September 8, 1943, or any person, firm or organization charged with having committed such action until officially acquitted or cleared; (4) a corporation or organization organized under the laws of any country other than Italy or Trieste; (5) any individual who was at any time after December 7, 1941, a citizen or subject of a nation other than Italy with which the United States had since December 7, 1941, been at war; (6) any individual voluntarily resident at any time since December 7, 1941, within the territory of any nation other than Italy with which the United States had been at war since December 7, 1941.

[31] Memorandum of Understanding I, Article II.

[32] Agreement between the Governments of the United States of America and the Federal Peoples Republic of Yugoslavia regarding pecuniary claims of the United States and its nationals, July 19, 1948. Under this agreement Yugoslavia made available 17 million dollars in "full settlement and discharge of all pecuniary claims of the Government of the United States . . . all claims of nationals of the United States

It is to be recognized that there are inherent weaknesses in the procedure. On the one hand, it is often difficult at the time of negotiating such an agreement to estimate the potential size of all legitimate claims which may exist.[33] The tendency in such cases is for the government of the claimants to place the amount of the lump sum settlement sufficiently high to offer a reasonable, or even more than reasonable, assurance of the sum being adequate to satisfy all possible legitimate claims which may subsequently be filed. The agreement could provide, as in the case of the Yugoslav Settlement, that any balance remaining will be returned to the liable government. However, politically, both governments may not wish to postpone a final settlement. The government liable for the satisfaction of the claims would not find it desirable to subject itself to future liability if the sum proves inadequate, and in such circumstances the claimant government may not be agreeable to committing itself to returning any unused balance.[34] In such circumstances the mere procedure of negotiating a settlement involves bargaining over the figure, and that in turn tends to create a climate of feeling on both sides of the table to settle the issue once and for all.

But the difficulties in following such a procedure do not appear to override the advantages. To be able to settle the issue as between governments is certainly worth the calculated risk to both governments in making the "guesstimate" as to the potential size of valid claims.

No procedure has been established for hearing or adjudicating claims against Italy for personal injury, including loss of life, or for war damages to property located outside of Italy. There is some likelihood that the Congress will authorize the War Claims Commission to deal with these claims.[35] Any United States national having such a claim should, however, place his claim on record. This should be done by filing a claim in the form of a sworn statement in duplicate with the Department of State. The claim should be in narrative form setting forth a clear chronological statement of the essential facts, covering such material facts as citizenship of the claimant, and in the case where the claim is based upon loss of life, the citizenship of the deceased; relationship of the claimant to the deceased in death cases; time, place, and circumstances under which the injury or death occurred, including the identity of persons, officials, or agencies causing the injury or death,

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. . . on account of the nationalization and other taking by Yugoslavia of property and of rights and interests in and with respect to property, which occurred between September 1, 1939, and the date hereof." Article 1 (a). Any excess over the claims determined to be valid is to be returned to the government of Yugoslavia. Article 1 (b).

[33] Much better information was obtained with respect to claims against Yugoslavia (see note 32, *supra*) than for claims against Italy. This can be attributed to the fact that the claims against Yugoslavia were largely for property expropriated since the war, where the claimants and the United States Government both knew immediately of the taking.

[34] But this was not the case in the Yugoslav settlement. See note 32, *supra*.

[35] Established by Act of July 3, 1948, 62 STAT. 1240, 50 U. S. C. App. §§2001-2013 (Supp. 1950). It has not been given authority to handle claims of this type.

and the nature and extent of damages sustained.[36] The State Department recommends that there be attached to the sworn statement affidavits and other documentary evidence supporting all of the material allegations therein. Further details concerning the nature of the evidence required in connection with the above can be obtained from the Department of State.[37]

In the case of the Italian agreement, very few claims have been submitted to the Department of State. In present circumstances of United States aid to Europe, it would seem logical for the United States to place a time limit on the filing of such claims, and to return any unused balance to Italy. Such a procedure would, of course, require Congressional action.[38]

III

UNITED STATES PROPERTY IN ITALY

A. The saisfaction of claims for damage to property in Italy belonging to, or in which there is an interest owned by, United States nationals, has certainly proved to be a long and hazardous process.

The Treaty, in dealing with this problem, begins with a clear dogmatic statement, simple of understanding. Article 78, paragraph 1, provides that Italy is to "restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists."[39]

Paragraph 2 provides that the property is to be restored "free of all encumbrances and charges of any kind to which they may have been subject as a result of the war. . . ."[40] All measures imposed against United Nations property between June 10, 1940, and the coming into force of the Treaty are nullified.[41] All transfers resulting from force or duress exerted by Axis governments and involving such property rights and interests belonging to United States nationals are to be invalidated by the Italian government.[42]

Unfortunately, the problem is too complicated to permit disposition by these simple rules. It was recognized that in many cases the property to be returned may have been totally destroyed or partially damaged as a result of the war. This problem has been the most difficult of solution, and has been the subject of successive negotiated clarifications. Paragraph 4 (a) of Article 78 provided that the Italian Government shall be responsible "for the restoration to complete good order of the

[36] Suggestions for preparing claims, for personal injury or loss of life, issued by the Department of State, January 5, 1946.

[37] The procedures applicable to claims for damages to property are covered below. See note 80, *infra*.

[38] Other alternatives would be to cover the unused portion into miscellaneous receipts of the Treasury Department, or for Congress to provide that such funds shall be available for settlement of claims against other countries.

[39] Treaty of Peace with Italy, Part VII, Section I, Article 78, paragraph 1.

[40] Treaty of Peace with Italy, Part VII, Section I, Article 78, paragraph 2.

[41] *Ibid.*

[42] Treaty of Peace with Italy, Part VII, Section I, Article 78, paragraph 3.

property returned to United Nations nationals."[43] The Article continues by providing that where the property cannot be returned, or where the property returned has been damaged, as a result of the war, Italy is to pay compensation "in lire to the extent of the sum necessary, at the date of payment" to purchase similar property or make good the loss suffered.[44]

Thus where no damage had been inflicted to the property it remains only for the Italian Government to return the property; where the property had been totally destroyed (a factory, owned by a United Nations national, completely demolished), then payment by Italy of two-thirds compensation in lire satisfies the Treaty requirements. But under the Treaty, what is the Italian Government's liability with respect to partially destroyed property: to restore to complete good order or to pay two-thirds of the sum necessary to make good the loss? The Treaty in two successive sentences provided for both procedures, but offers no guide for determining which procedure is to be followed.

The confusion was naturally one to be examined in the negotiations leading to the Lombardo Agreement.[45] While the confusion was not confounded in that Agreement, it was not completely clarified. The Lombardo Agreement provided that the Government of Italy would expedite arrangements for the desequestration of and release of any unusual controls over the property, including cancellation of contracts for the sale of capital assets, or arrangements taken in accordance with official direction, which were not deemed to be in the best interest of such property or interests.[46] The agreement provided further that the "requirement for restoration to good order" shall be followed in all cases where there has been "(1) deterioration of the physical property while under Italian control, and (2) where the physical property has suffered non-substantial damage as a result of acts of war."[47] In all other cases the requirement to compensate in lire to the extent of "two-thirds of the sum necessary" is to apply, unless the Government of Italy determines to apply the requirement for the restoration to complete good order.[48]

The field of discussion had been narrowed. Under the Lombardo Agreement in one set of circumstances one had only to interpret the phrase "non-substantial damage." In another set of circumstances there still remained the problem of what to do in those cases where Italian management of the property had caused a serious deterioration in its value. For example, what was to happen where Italian management had resulted in sale of capital assets, which no longer could be traced? In such circumstances the requirement of "restoration to complete good order" lacks practical significance.

[43] Treaty of Peace with Italy, Part VII, Section I, Article 78, paragraph 4 (a).
[44] *Ibid.*
[45] See note 29, *supra.*
[46] Memorandum of understanding between the Government of the United States of America and the Government of Italy regarding settlement of certain wartime claims and related matters (herein referred to as Memorandum of Understanding II), Article 16 (a), August 14, 1947. See note 29, *supra.*
[47] *Ibid.*
[48] *Ibid.*

The clarifying language required further clarification. Accordingly in February of 1949, it was agreed in an exchange of notes between the two governments:[49]

(a) Where at the date of payment the approved amount of a claim is 1,500,000 lire or less, then the claim shall be considered as relating to deterioration of physical property while under Italian control or to non-substantial damage as a result of war, and in such circumstances Italy is required to pay the full amount of the claim.

(b) Where the approved claim at date of payment is in excess of 1,500,000 lire, but two-thirds of the amount is less than 1,500,000 lire, Italy is to pay 1,500,000 lire. In all other cases Italy is to pay two-thirds of the approved amount of the claim.

(c) Paragraphs (a) and (b) do not relieve the Government of Italy of the requirement of the Lombardo Agreement to release the property from any unusual controls, and to return the property irrespective of the possession or purported ownership thereof. However, where the property is not in existence, paragraphs (a) and (b) apply.

(d) A claimant may present separate claims where the properties for which he is claiming are not physically contiguous and do not form a part of a related whole.

B. Further provisions of the Treaty and subsequent clarifying agreements relating to claims for property in Italy should be examined, and consideration given to the procedures for filing claims, before review is made of the process in practice.

In the case of corporations or associations which are not United Nations nationals, but in which United Nations nationals hold, directly or indirectly, ownership interests, such nationals are to receive compensation for any damage or injury suffered by such corporation in accordance with the provisions applicable to cases where the property is directly owned by the United Nations national.[50] In such cases, the compensation based on the total loss or damage shall bear the same proportion to such loss or damage as the beneficial interests of such nationals in the corporation or association bear to the total capital thereof.[51]

The Treaty provided further that any compensation paid is to be free of taxes or other levies, and freely usable in Italy, but subject to Italian foreign exchange controls.[52] All reasonable expenses incurred in Italy in establishing such claims are to be borne by the Italian Government.[53]

A United Nations national is defined in the Treaty as a national of a United Nation at the coming into force of the Treaty, provided that such status was held as of the time of the armistice with Italy, September 3, 1943.[54] The Lombardo

[49] These notes have not been made public. They were exchanged between the United States Embassy at Rome and the Italian Ministry of Foreign Affairs.

[50] Treaty of Peace with Italy, Part VII, Section I, Article 78, paragraph 4(b).

[51] *Ibid.*

[52] Treaty of Peace with Italy, Part VII, Section I, Article 78, paragraph 4 (c).

[53] Treaty of Peace with Italy, Part VII, Section I, Article 78, paragraph 5.

[54] Treaty of Peace with Italy, Part VII, Section I, Article 78, paragraph 9 (a).

The term "United Nations nationals" is defined as also including "all individuals, corporations or associations which, under the laws in force in Italy during the war, have been treated as enemy."

An owner is defined as the United Nations national who is entitled to the property, including successor owner, provided such successor is also a "United Nations national." Treaty of Peace with Italy, Part VII, Section I, Article 78, paragraph 9 (a).

Agreement provided that the individual must be a national as of the date of that agreement, rather than the date of the Treaty;[55] the Agreement of February, 1949, provided that a person may qualify as a United Nations national (insofar as United States nationals are concerned) either under the Treaty requirement or the Lombardo Agreement requirement.[56]

Under the Treaty any dispute arising with respect to claims for property in Italy is to be referred to a Conciliation Commission consisting of one representative of Italy and one of the Government of the United Nation concerned. If agreement cannot be reached by the Commission within three months, either Government may request the addition of one additional member selected by the two Governments. In the event that agreement cannot be reached on the appointment of a third member, the Government shall apply to the Ambassadors in Rome of the "Big Four" countries, who are to appoint the third member. And in the event they cannot agree (a more likely possibility today than at the time of the drafting of the Treaty), the Secretary-General of the United Nations may be requested by either party to make the appointment.[57]

While the Lombardo Agreement did not deal with the Conciliation Commission, the Agreement of February, 1949, made the Treaty provision applicable to disputes arising under both the Lombardo Agreement and the Agreement of February, 1949.[58]

On June 29, 1950, the Italian-United States Conciliation Commission was formally established,[59] and issued rules of procedure for its operation.[60] It is important to note that these rules provide that each of the two governments is to be represented before the Commission by a duly designated agent or deputy agent, and that the Commission will not receive or consider any statement or document unless presented through the respective agents or ordered produced by the Commission.[61] Proceedings before the Commission are initiated by the formal filing with the Secretariat of the Commission of a Petition signed by the agent of the claiming government.[62] The petition must contain full information concerning the claimant on whose behalf the proceedings are initiated; a clear and concise statement of the facts in each case; a clear and concise statement of the principles of law upon which the dispute is based;

[55] Memorandum of Understanding II, Article V, paragraph 18.

[56] See note 49, *supra*.

[57] Treaty of Peace with Italy, Part IX, Article 83, paragraph 1. The Treaty provides for a separate conciliation commission for each United Nation which may be involved in a dispute. Thus there is an Anglo-Italian Conciliation Commission, a French-Italian Conciliation Commission, etc. This is not a very workable arrangement. It is to be hoped that the Japanese Treaty, if and when finalized and signed, will provide for one conciliation commission for all disputes, in which event it should probably consist of nationals of neutral countries not parties to the Treaty.

[58] See note 49, *supra*.

[59] The American member is Emmett A. Scanlan, Jr.; the Italian member is Antonio Sorrentino.

[60] Rules of Procedure of the Italian-United States Conciliation Commission, adopted and promulgated in Rome on June 29, 1950. The Commission has its seat in Rome. Its rules have not, as of the date of writing, been published officially in this country.

[61] Rules of Procedure, Article 4.

[62] Rules of Procedure, Article 7, paragraph (a).

and a complete statement setting forth the purpose of the Petition and the relief requested.[63] Upon the filing of a Petition, an Answer signed by the agent of the responding government must be filed within 30 days.[64] The Answer must contain a statement of the facts presented in the Petition of the claiming government which are admitted as true, a statement of any other element of fact upon which the responding government is relying in its defense of the case, and a clear concise statement of the principles of law upon which the dispute is based.[65] The complaining government may file a reply to the Answer by making a written request within 15 days after the filing of the Answer for an order establishing the time limit for filing the reply.[66] The reply may deal with the allegations in the answer which raise factual or legal defenses or new material not alleged or adequately treated by the complaining government in the petition.[67] Following the common law procedure of rejoinders, surrejoinders, rebutters, and surrebutters, the rules provide that when the respondent government considers that a counter-reply is necessary it shall, within 15 days after the filing of the reply, make a written request to the Commission for an order establishing the time limit for filing the counter-reply.[68] The Commission will hear oral testimony only in exceptional cases, upon order of the Commission authorizing its admission.[69] The Commission may order officials of either government to receive sworn testimony of a witness taken in answer to written questions prepared by the agent of either government and approved by the Commission.[70] Such testimony is to be given under oath either in accordance with the terms of the law of the place where such testimony is to be given or in accordance with the laws of the country of which the witnesses are nationals, as the Commission shall determine in each particular instance.[71] The Commission may also request the agents to develop their arguments orally after they have completed the submission of proof, and the agents may file a written citation of legal authorities.[72] Briefs may be submitted by the agent of either government unless the Commission directs otherwise.[73] Proceedings before the Commission, both oral and written, may be in either English or Italian.[74] If within three months after a dispute has been referred to the Commission it has been unable to reach an agreement, the two members of the Commission or either of them may issue a "Procés-Verbal of Non-Agreement."[75] The agents are then required to notify their governments of such issuance of a "Procés-Verbal of Non-Agreement."[76]

In such cases a third member of the Commission appointed pusuant to Article 83 of the Treaty is to preside at all hearings or other sittings which may be held.[77]

[63] *Ibid.*
[64] Rules of Procedure, Article 8, paragraph (a).
[65] *Ibid.*
[66] Rules of Procedure, Article 8, paragraph (c).
[67] *Ibid.*
[68] Rules of Procedure, Article 8, paragraph (d).
[69] *Id.*, Article 10, paragraph (a).
[70] *Id.*, Article 10, paragraph (b).
[71] *Id.*, Article 10, paragraph (d).
[72] *Id.*, Article 11, paragraph (a).
[73] *Id.*, Article 11, paragraph (c).
[74] *Id.*, Article 12.
[75] *Id.*, Article 14.
[76] *Id.*, Article 15, paragraph (a).
[77] *Id.*, Article 15, paragraph (b).

The proceedings before the Commission of three members are limited to the points on which no agreement can be reached by the Commission of two members, agreements on points previously reached by the two members being final and non-reviewable.[78] Decisions by the Commission of three members are to be by majority vote, although the member in the minority has the right to deposit with the Secretariat a statement of the reasons for his dissent.[79]

In actual execution, the satisfaction of claims of United States nationals with respect to property in Italy has been a slow process. The Italian Government, in accordance with the terms of the Lombardo Agreement, designated the Ministry of Finance as the agency of the Italian Government responsible for dealing with such claims. To assist United States nationals, the Department of State appointed a special section in the Embassy in Rome to assist in the presentation of claims.

Technically, under Article 76, paragraph 82 of the Treaty, claims may be filed directly with the Italian Government. However, experience indicates that the Italian Government does not accept claims unless filed by the United States Embassy at Rome. In any event a claimant is better advised to submit the claim to the Department of State, for transmission to the United States Embassy at Rome, or directly to the Embassy.

In submitting claims for loss or damage to property, the Department of State recommends[80] that the claim contain in narrative form a clear chronological statement of the essential facts relating to citizenship of the claimant or claimants; a full description of the property in question, and its exact location when the loss occurred; the time and manner of the acquisition of the claimant's ownership of the property or other interest therein; the action taken against the property which is considered as giving rights to a claim against the Italian Government; the identification of persons, officials, agencies, or forces taking such action, and the dates when the action was taken; and the nature and amount of the damage resulting from the action concerning which a complaint is being filed. There should also be submitted evidence in support of the sworn statements of the claimant or claimants. Full details concerning the nature of the evidence required can be obtained from the Department of State.

C. It was only in the late spring of 1950 that Italy satisfied any claims. The establishment of the Conciliation Commission assisted considerably in expediting the consideration and the payment of claims. Thus the United States referred cases to the Commission on the ground that the Italian Government had not made any disposition of a claim long on file with it. However, internal Italian Government pressure probably accounts for the activity generated last spring. The Italian Ministry of Foreign Affairs, embarrassed in its relations with the United States by reason of the long period of inactivity, undoubtedy brought pressure on the Ministry of Finance.

[78] *Id.*, Article 15, paragraph (c). [79] *Id.*, Article 16.

[80] Suggestions for preparing claims for loss of or damage to property, issued by the Department of State, December 20, 1945.

The available statistics reveal the following record. The United States Embassy at Rome had, as of December 3, 1950, received a total of 1391 claims (including those forwarded to it by the Department of State) with an alleged lire value of 52,628,987,446. Of these cases 881 had been submitted to the Italian Government, of which 69 had been accepted, 12 paid, and 30 rejected. Six of the rejected claims have been filed with the Conciliation Commission (including cases referred to it by the United States Embassy where the Italian Government had, in the Embassy's opinion, unduly procrastinated in disposing of the claims). The total value of the claims paid reflects a considerably better record than the number. Thus the Italian Government as of December 31, 1950, paid out 1,816,195,408 lire (conversion to dollars at that time being 624 lire to the dollar).

IV

CONCLUSION

The general conclusion that can be drawn, without implying any criticism to either Government, is that a better way ought to be found to deal with such claims for property damages. The disposition of claims for personal injury cases in the Lombardo Agreement provides a more practicable framework for handling the problem.

Such a procedure would require the following steps:

(1) The United States Government would require its nationals to file claims with it by a specified date.

(2) The United States would then negotiate with the other Government for a lump sum settlement, whether the settlement should be in dollars or in the currency of the other Government depending on the nature of the claims.

(3) Out of such sum so obtained, the United States Government would determine the validity of claims, and make payment accordingly.

Obviously, such a procedure is not now open to the settlement of claims under the Italian Treaty, but a comparable procedure is available. United States claimants could form an association comparable to the Foreign Bond Holders Protective Council, Inc., which would appoint a committee to evaluate such claims, negotiate a lump sum settlement with the Italians, binding on all members of the association, and then provide for the satisfaction of the claims through its own procedures.

In any event, the lump-sum settlement procedure deserves consideration with respect to the negotiation of the Japanese Treaty of Peace. At least it can be expected that the United States negotiators will bear in mind that the procedure established in the favorable circumstances of United States-Italian relations is not a very satisfactory one. That procedure is not one likely to bring relatively quick satisfaction to the United States claimants, nor one designed to remove the troublesome claims issue from being an undesirable source of conflict between the United States and the other Government concerned.

PROBLEMS OF COMPENSATION AND RESTITUTION IN GERMANY AND AUSTRIA

MONROE KARASIK*

I

BACKGROUND

During the twelve years of its existence Nazi Germany carried out what was probably the greatest program of looting and spoliation of property that was ever devised. It was a conscious policy arising out of a complex of motives, some as ancient as the almost immemorial concept of "spoils of war," and some arising from factors which would require analysis by a modern psychiatrist. There is a distinction (which for technical reasons will be maintained in this paper) between acts of spoliation within Germany and such acts accomplished in other countries, as the Nazis overran them. The distinction is superficial because the overrunning of foreign countries was conceived by the Nazis as an extension of the German imperium, and the principle underlying spoliation was the same in Germany and abroad—the superior claim of the Herrenvolk and the German State to property held by what was conceived as inferior types of people.

Within Germany the program of spoliation was directed mainly against the Jews and was pursued by a variety of methods ranging from the passage of legislation to outright murder. These same tactics were employed against the property of Jews who were found in German-annexed or German-conquered countries. Measures of lesser severity were employed against other persons and institutions in those countries.

The post-war process of returning property to German-occupied countries came to be called "external restitution" and that of returning property to individuals when it had been taken in Germany was called "internal restitution." While this paper in using the word "restitution" will confine itself to "internal restitution," as to both the concept of "return" has a common origin in the wartime and post-war expressions of the Allied Powers. From these the intent to return spoliated property is quite clear.

Undoubtedly the basic motive of the Allies in seeking return of the despoiled property was the general shocking inequity to the modern Western mind of linking property rights with class status, but the stimuli which transformed a feeling into a positive program were pressures to rectify these obvious injustices. In the case of external restitution, the despoiled countries were the movants, as were the despoiled

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persons or their heirs resident in Allied countries in the matter of internal restitution.

The basic Allied expression of an intent to accomplish the process of restitution is contained in the "Inter-Allied Declaration Against Acts of Dispossession Committed in Territories Under Enemy Occupation or Control" issued in London on January 5, 1943.[1] Here, after the declaration of intent, the operative words are those reserving the rights of the signatories to declare invalid any transfers of or dealings with property situated in the territories "which have come under the occupation or control" of the enemy nations. While the use of the perfect tense demonstrates that the declaration as such did not apply to acts of dispossession accomplished within the boundaries of pre-war Germany, subsequent actions of the Allied Powers made it plain that the general concept here found expression.

The legal complexities of the problems to be solved in effecting restitution in Germany (hereinbelow discussed at greater length) were not, at war's end, susceptible of immediate solution. But the intent of the Allies to attack and solve the problems is demonstrated in paragraph 42 (b) of the Four-Power Control Agreement of September 20, 1945, where the signatories declared:

> The German authorities will comply with such directions as the Allied Representatives may issue regarding the property, assets, rights, titles and interests of persons affected by legislation involving discrimination on grounds of race, colour, creed, language or political opinions.

This had been a United States policy at an earlier date, when the directive of the Joint Chiefs of Staff to the Commander-in-Chief of the United States Occupation Forces (popularly known as JCS 1067) had been formulated in April of 1945. (The directive was not, however, released until October 17, 1945.) Here the United States Commander-in-Chief had been directed at paragraph 48 (e) (2) to impound:

> Property which has been the subject of transfer under duress or wrongful acts of confiscation, disposition or spoliation, whether pursuant to legislation or by procedure purporting to follow forms of law or otherwise.

[1] The Union of South Africa, the United States of America, Australia, Belgium, Canada, China, the Czechoslovak Republic, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, Greece, India, Luxembourg, the Netherlands, New Zealand, Norway, Poland, Yugoslavia, and the French National Committee:

Hereby issue a formal warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practiced by the governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled.

Accordingly, the governments making this declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

The governments making this declaration and the French National Committee solemnly record their solidarity in this matter.

The problem of "restitution" concerned itself with finding ways to solve the problems arising out of the unjust treatment of property rights. The treatment of problems arising out of the unjust treatment of persons is termed "compensation." Expressions of Allied intent on this problem are much more limited. The one Allied agreement in which a thesis of compensation may be found is in the agreement on reparations from Germany, dated Paris, December 21, 1945. Article 8 of the agreement deals with the allocation of a reparation share to non-repatriable victims of German action. This Article recognizes that "large numbers of persons have suffered heavily in the hands of the Nazis and now stand in dire need of aid to promote their rehabilitation but will be unable to claim the assistance of any Government receiving reparation from Germany." Accordingly the signatory governments agreed to work out a common agremeent with the Intergovernmental Committee on Refugees (succeeded by the I.R.O.) along the following lines:

A. A share of reparation consisting of all the monetary gold found by the Allied Armed Forces in Germany and in addition a sum not exceeding 25 million dollars shall be allocated for the rehabilitation and resettlement of non-repatriable victims of German action.

B. The sum of 25 million dollars shall be met from a portion of the proceeds of German assets in neutral countries which are available for reparation.

C. Governments of neutral countries shall be requested to make available for this purpose (in addition to the sum of 25 million dollars) assets in such countries of victims of Nazi action who have since died and left no heirs.

II

PROBLEMS AS OF V. E. DAY

As to restitution, the scale of takings, transfers, and subsequent transfers of property over a period of 12 years in the case of Germany and 7 years in the case of Austria by the sheer mathematics of probability results in the near impossibility of a complete analysis or categorization of the situations to be remedied. It also makes essential a system of restoring and making whole devised along the most broadly equitable lines.

As of the end of World War II there were a great many mechanical and economic difficulties to be overcome in attempting to restore anything like the *status quo ante* with respect to property. Chief among the difficulties requiring new modes of legal attack was the standing of the bona fide third party holder of real property. To what extent did such a holder have notice when he purchased from the original wrongdoer or an intermediate holder, particularly when, by pre-Nazi law, he was under no obligation to go behind the title inscribed in the Land Register in the name of his predecessor? If such property were to be returned to the original owner what rights existed as between the bona fide third party and the original wrongdoer? What was to be done in the case of accretions or contributions made to the property by the person in possession or a mesne holder in good faith? What was to be the

status of the claims of bona fide creditors whose rights were secured by the property? In addition to such problems concerning a bona fide third party holder (or "occupant" as he came to be known), a currency conversion in 1948 in Germany was still further to complicate the problem of indebtedness secured by the property, as well as the problem of return of consideration actually obtained by the original owner at the time of the original forced transfer.

Economic problems affecting the occupying powers arose from the magnitude of the destruction of Jewish life. Of the 600,000 Jews who had been in Germany in 1933, only 300,000 remained alive as of V.E. day, and of these only about 15,000 remained in Germany. If return were to be made of the property of these persons, and if return were to be made to the heirs and successors of the 300,000 slain, the economic problems resulting from absentee ownership would have to be faced by the occupation authorities, and since the moral right to transfer of income or other earnings would be strongly claimed by restitution claimants in the countries of the occupying powers, the economic problem involved was sure to be raised by back-home pressures.

A program of restitution would also raise political problems in the governance of occupied Germany, and in relations with the Austrian Government. For instance, since the physical effects of war had developed an acute housing crisis in the metropolitan centers of Germany and Austria, the political problem of ousting occupants in favor of claimants was raised. In this connection, too, the requisitioning needs of the occupation forces had imposed an additional burden upon the use of existing dwellings. Were claimants to receive the same treatment as occupants when requisition was to be made?

In addition to problems in the general fields of law, economics, and politics, there were many special problems. For example, there were a whole host of problems dealing with corporations which had to be untangled. During the Nazi regime corporations from the control of which their real owners had been ousted by discriminatory legislation continued to function and grow, bought and sold assets, expanded or diminished. Share capital was increased, borrowings were undertaken. How was the proportion of the claimant's present interest to be computed? How was the loss of preemptive rights to be handled? All this was further complicated by the general European custom of the issuance of bearer shares, and the probative problems to which this practice gave rise.

What were the solutions in the case of the restitution of special property rights such as patents and copyrights, which had limitations of time and use? What was to happen in other special property situations, such as the licensee's obligation to work a limited right of exploration to the point of discovery in order to transform it into a vested right of exploitation under the mining laws?

And how, finally, was the problem of heirless assets to be resolved? It was obvious that a large part of the assets owned by the slaughtered thousands must have no

natural heirs, and it could not be just that this property escheat to the benefit of a group which must include the persecutors.

In the case of compensation for damages to the person there were even more difficult problems. What scale of measurement could be used to evaluate gross damages to the person such as imprisonment, maiming, and death? How was it possible to compute the damage caused by the interruption of education or the interruption of a career? In narrower fields, what effective compensation could be made to those who had pension rights under governmental or private systems, and who now lived abroad? What was to become of their contributions to social security funds? These last, of course, were largely transfer problems, but they were keenly felt.

Consideration of the reinstatement of employment rights or the restoration of contracts for services led to simpler problems, but the commutation of these rights also resulted in transfer questions.

These problems, and many others, were foreseen before the end of the war, but they proved so difficult of solution that the first Austrian restitution law of general application was not enacted until February 6, 1947,[2] and the first restitution law of general application was passed in the United States Zone of Germany November 29, 1947.[3] (An elementary and very limited restitution law was enacted for Thuringia in the Soviet Zone on September 14, 1945, but so far as can be learned no action was ever taken under this law actually to effect restitution.)

III

RESTITUTION AND COMPENSATION LAWS OF GERMANY AND AUSTRIA

A. Restitution in Germany

As noted above, the first restitution law of general application in Germany was passed in the United States Zone on November 29, 1947 (Military Government Law 59). A more limited restitution law had been promulgated by the French Military Government on November 10, 1947 (Ordinance 120). No law effecting restitution was passed in the British Zone until May 12, 1949, when the British Military Government promulgated Military Government Law 59 in form substantially similar to the American law. These laws of course applied only to the Western Zones of Germany. In Western Berlin an order of the Allied Kommandatura was issued on July 26, 1949, which in general follows the British Military Government Law 59.

Since the United States Military Government Law 59 is the most extensive it would be well to set forth its salient features and to comment upon them in the light of the needs they sought to fulfill.

(1) The intent of the law is explicitly set forth in Article I, where the purpose

[2] 3d Restitution Law, Bundesgesetzblatt Enactment No. 54.

[3] Part 3, subtitle A, title 10, Code of Federal Regulations (1947 Supp.) §§3.75-3.93; 72 F. R. 7983-7994; Statement, the Adjutant General, 12 F. R. 7983-94 (Nov. 28, 1947). Military Government Law No. 59.

is stated to be to effect speedy restitution of identifiable property to the largest extent possible "to persons who were wrongfully deprived of such property within the period from January 30, 1933 to May 8, 1945, for reasons of race, religion, nationality, ideology, or political opposition to National Socialism."

The approach to third party problems is likewise explicitly set forth in Article I, pararaph 2 of which directs the restoration of property to its former owner or his successor in accordance with the provisions of the law, even though the interests of other persons who had no knowledge of the wrongful taking must be subordinated. It also states that provisions of law affecting protection of purchasers in good faith which would defeat restitution should be disregarded except as otherwise provided by Law 59.

Thus, the broad equitable approach necessary in cutting through the complexities of multitudinous transactions and devolutions in being made clear at the outset, serves as a guide to the interpretation of the law to the end that the greatest possible measure of relief may be given those wrongfully despoiled of their property.

(2) Within this framework Article II defines acts of confiscation. The important categories of confiscatory action are:

> 1. A transaction *contra bonos mores*, threats or duress, or an unlawful taking or any other tort;
> 2. Seizure due to governmental act or by abuse of such act;
> 3. Seizure as a result of measures taken by the NSDAP, its formations or affiliated organizations. . . .

To constitute confiscation such actions must have been caused by or constituted measures of persecution for any of the reasons set forth in Article I.

An interesting feature of this Article is its anticipation (and barring) of possible strict legalistic interpretation of acts of confiscation. It makes unavailable to the occupant defenses based, for instance, upon the plea that at the time of its commission the confiscatory act was not *contra bonos mores* because it conformed to the then prevailing *mores* concerning discrimination against certain classes of individuals. The interdiction of such defenses is, of course, in line with the general equitable philosophy behind the law.

(3) Article III was drafted for the purpose of simplifying the evidentiary problems faced by claimants who would have to prove the fact of confiscation. This Article establishes a rebuttable presumption of confiscation where the person against whom the act was taken was directly exposed to persecutory measures (hereinafter called a "persecutee") or belonged to a class of persons which was to be eliminated from the cultural and economic life of Germany by measures taken by the State or by the National Socialist party (hereinafter called a "discriminatee"). In these cases it provides that any transfer or relinquishment of property by either of such persons between January 30, 1933, and May 8, 1945, shall be presumed to be a confiscatory act. The unsupported presumption, however, may be rebutted by a showing

that the transferor was paid a fair purchase price, but only if he were not denied the free disposal of the monies received by reasons of his status in a class discriminated against.

Article IV supports the presumption of confiscation by giving the claimant the power of avoidance of any transaction involving the transfer or relinquishment of property entered into by the discriminatee during the period from the date of the first Nuremberg laws (September 15, 1935) to May 8, 1945, but permits the interposition of defenses (a) that the transaction as such would have taken place even in the absence of National Socialism, or (b) that the transferee protected the property interests of the claimant or his predecessor in an unusual manner, and with substantial success.

Article V establishes a rebuttable presumption that a gratuitous transfer made by a persecutee within the period from January 30, 1933, to May 8, 1945, constituted a bailment or fiduciary relationship rather than a donation.

(4) The definition of confiscated property, establishment of the above mentioned presumptions, and the power of avoidance cuts through for the benefit of the claimant the possible defenses of good faith and lack of notice which might have ordinarily been raised by an occupant of real property under a title registration system. And this is as it should be, since real property transfers in pre-war Germany traditionally were accomplished with great scrupulousness, and, notwithstanding the safeguard of registration, ordinarily with careful examination of the legitimacy of title held by the transferor, while the dispossessions practiced in Nazi Germany were open, notorious, and extensive.

With respect to personalty, however, other considerations necessarily arise. The turnover of personal property is always much more rapid than that of realty. The number of transactions intervening between the original act of confiscation and the time of a possible claim for restitution would ordinarily be so great that the likelihood even of implied notice to the present holder would in most cases be non-existent. Accordingly, the general rule (Article 19) is that "tangible personal property shall not be subject to restitution if the present owner or his predecessor in interest acquired it in the course of an ordinary and usual business transaction in an establishment normally dealing in that type of property."

However, where, from the facts, notice might exist or be implied, exceptions are made to the rule, and a claim for restitution will lie. The general exceptions in Article 19 also cover religious objects, property of unusual scientific, artistic or sentimental personal value, and property acquired at an establishment engaged to a considerable extent in the business of disposing of confiscated property. Money (Article 20) is restitutable only if the claimant can show that the holder knew or should have known at the time of its acquisition that it had been confiscated. But in the case of bearer instruments (Article 21) the holder (who in the absence of special circumstances is entitled to a presumption of good faith if the acquisition

were made in the course of ordinary and usual business transactions) must bear the burden of showing that he did not know or should not have known that the instrument had at any time been confiscated. In addition, where the degree of notice approaches actual notice (as where the bearer instruments constituted a participation in a family enterprise) bearer instruments are unconditionally subject to restitution.

(5) The problem of third party rights is, like all others in this Law, approached on an equitable basis, and with the recognition of possible equities existing in the favor of the third party.

Third party interests in property which existed prior to the act of confiscation are continued to the extent that they thereafter have remained undischarged or unextinguished (Article 37). This also applies to any interest subsequently created to the extent which the total amount of all claims (such as mortgages against the property) does not at the time the claim is made exceed the total of all similar interests at the time of the act of confiscation. The same rule, *mutatis mutandis,* applies to such encumbrances as easements where, for instance, a prior easement had been extinguished and a subsequent easement was no more burdensome than the one existing at the time of confiscation.

The rule on the limitation of encumbrances is relaxed to the extent that certain post-confiscatory claims may be secured by the property. These claims are those which might arise from expenditures made in good faith by the restitutor for the benefit of the property, but even this relaxation is carefully limited in favor of the claimant.

An encumbrance created by any act constituting confiscation (such as a mortgage or lien impressed upon the property in connection with the Capital Flight tax or the Property Tax on Jews) inures to the benefit of the claimant of the property (Article 38).[4]

(6) Other important general provisions of this Law provide that:

(a) If the claimant relinquishes all other claims under this Law, he may demand from the person who first acquired the property payment of the difference between the price received and the fair purchase price of the property (Article 15).

(b) The claimant is required to refund to the restitutor any consideration which he may have received in the original transaction less any sum of which he may not have had free disposition. In addition to this the claimant must refund the amount of any original encumbrance discharged after the time of confiscation, unless it has been replaced by another encumbrance or would be extinguished by operation of Article 38. However, in no event is he required to make refund in an amount exceeding the value of the property at the time of restitution (Article 44).

[4] The text of this article as printed in the Federal Register for Nov. 29, 1947, is misleading. It reads: ". . . such an encumbrance shall devolve on the claimant. . . ." The German text reads: "So geht das Recht aus eine solchen Belastung auf den Berechtigten ueber, und ist bei Berechnung der in Artikel 37 vorgesehnen Belastungsgrenze nichtze Bernecksichtigen," which would be translated as "The rights flowing from such an encumbrance" etc. The German text is official.

(7) Many of the special problems referred to in Part II of this paper are covered by this Law. For instance, the adjudicatory bodies created by the Law are empowered to do such things as to order the cancellation, new issue, or exchange of instruments evidencing participation in business enterprises, where these have been confiscated, and the enterprise was closely held, to the end that the claimant may be restored to his original participation in the enterprise (Article 23).

The most important special problem treated by this Law, however, is the problem of heirless assets. In connection with this a presumption of death as of May 8, 1945, is created in Article 51 as to "any persecuted person whose last known residence was in Germany or a country under the jurisdiction of or occupied by Germany and its Allies and as to whose whereabouts or continued life after May 8, 1945, no information is available. . . ." Article 10 empowers creation of a successor organization to be appointed by the Military Government, which shall be entitled instead of the State to the entire estate of any heirless persecuted person.[5]

(8) The law created special procedures and tribunals for its implementation:

(a) A Central Filing Agency for the receipt and processing of petitions for restitution (Article 55).

(b) Restitution Agencies, the function of which is to receive completed petitions from the Central Filing Agency and attempt to effect an amicable settlement between the parties (Article 92 and 62).

(c) Restitution chambers of German District Courts composed of a presiding judge and two associate judges, one of the three of which must belong to a class of persons determined to be a persecutee (Article 66) under the general definition of Law 59. These chambers have the responsibility of adjudicating claims in which amicable settlement cannot be reached (Articles 63, 64, 67, and 68).

(d) Appeals from the judgment of the restitution chambers may be taken to German appellate courts (Oberlandesgericht), which however may only render judgment on the law (Article 68).

(e) A Court of Restitution Appeals has the power to review any decisions or any claim for restitution under this Law, both as to law and as to fact, and take whatever action is deemed necessary with respect thereto (Article 69). This Court, by Military Government Regulation, is composed of three members of the judiciary of United States courts in in Germany.

Naturally there are also provisions requiring persons who have or had confiscated

[5] This was implemented by the Military Government in 1948 by the appointment of the Jewish Restitution Successor Organization (JRSO), a New York State corporation representing all leading Jewish organizations in the world. The funds and properties received by JRSO under the law are used for the relief and rehabilitation of Jewish victims of Nazism. The special courts administering Law 59 are empowered to recognize other appropriate successor organizations as proper claimants for heirless property not claimed by JRSO.

property in their possession at any time after it was transferred or taken from a persecuted person, to report these facts to the Central Filing Agency (Article 73), and empowering the Restitution Authorities to issue temporary injunctions or restraining orders for the safeguarding of property (Article 52).

As of December 31, 1950, there had been about 65,000 individual restitution claims received by the Restitution Agencies in the United States Zone. Of these, about 25,000 claims had been finally disposed of. Of the 163,000 claims made by the Jewish Restitution Successor Organization (JRSO), about one-half to two-thirds are estimated to be duplications. About 47,000 JRSO cases had been forwarded to the Restitution Agencies, of which slightly less than 8,000 had been finally disposed of. The total value of the properties restituted was about 521 million Deutsche Marks.

In the British Zone as of the middle of 1950, some 68,000 declarations of confiscated property had been filed, and against these there were about 35,000 claims filed. Of these only a minor fraction had been finally disposed of.

In Western Berlin, as of the middle of 1950, there had been 28,850 claims filed, of which 13,800 had been forwarded to the Restitution Agencies; 450 odd had been finally disposed of.

There are no reliable statistics available concerning the operation of the restitution program in the French Zone.

B. Compensation in Western Germany

The difficulties in promulgating a uniform General Claims Law for the United States Zone made it necessary to enact interim legislation providing for payments to persecutees and their relatives whose economic conditions necessitated immediate financial support. Such legislation was promulgated in the form of Interim Award Laws which were enacted by the four Laender of the United States Zone in the summer of 1946.

Pursuant to the requests of the Military Government, the Laenderrat (Council of the four Laender comprising the United States Zone) studied the problems of further indemnification laws and by November, 1948, submitted for Military Government approval "Draft Law Concerning Redress of National Socialist Wrongs (General Claims Law)." After further study and redrafting the Law received the approval of the United States Military Governor in August, 1949, and soon thereafter was promulgated in individual texts by each of the Laender. Except for necessary minor administrative differences, the four Laender laws are identical.

C. Basic Provisions and Implementation of the General Claims Laws

The basic provisions of the laws and implementing regulations are as follows:

(1) There is a right to indemnification (here called "restitution") in any person who, under National Socialist dictatorship (January 30, 1933 to May 8, 1945), was persecuted because of political conviction or for racial, religious or ideological grounds and, therefore, has suffered damage to life and limb, health, liberty, posses-

sions, property, or to his economic advancement, *unless* such person shall have: (a) supported the National Socialist dictatorship; or (b) after May 8, 1945 been deprived of Civil Rights; or (c) after May 8, 1945 been sentenced by final judgment to prison for more than three years (Article 1).

(2) For the Land to be liable as restitutor, such person shall have (a) had his legitimate domicile or usual residence within that Land on January 1, 1947; or (b) been assigned to that Land as refugee on that date; or (c) having had such domicile or residence, died or emigrated prior to that date (Article 6), except that the Land is not liable for damages for loss of liberty to anyone who died or emigrated prior to January 1, 1947 (Article 15, Section 4).

(3) Persons who resided in a Displaced Persons Camp in the United States Zone on January 1, 1947 are also eligible, provided they are integrated into the legal and economic system of the Land from which they claim restitution or become integrated within one year after the effective date of this law, or after December 31, 1946, emigrated or will emigrate from such Land, except that residence in a transient camp for emigrants shall not be taken into consideration (Article 6).

(4) Damages to real property shall be compensated by the Land in which the realty is located, regardless of the domicile or usual residence of the claimant (Article 6).

(5) Monetary claims for the period prior to June 21, 1948 shall be computed in Reichsmark and converted into Deutsche Mark at the ratio of 10:2 (Article 3).

(6) The right to claim restitution shall, except in certain cases, pass to the heirs of eligible claimants (Article 9).

(7) The time for filing has now expired, but originally the law provided that, in general, where the claimant was within Germany, he must have filed an informal claim before March 31, 1950, and he must have submitted the formal application forms and required documents by June 30, 1950. Claims filed from outside Germany must have been submitted not later than June 30, 1950, and the required forms and documents must have reached the Land Claims Office on or before September 30, 1950.

(8) Damage to life and limb, health, and liberty is compensated as follows (Articles 13-15):

(a) Death benefit—
Annuity to widow until death or remarriage.
Allowance to minor children.
Lump sum payment for past period between death and commencement of annuity.

(b) Damage to body—
Medical treatment.
Annuities if 30 per cent incapacitated.
Lump sum payment for past period.

(c) Deprivation of liberty—
150 DM for each month of detention, granted independent of other restitution payments.

(9) Damage to possessions and property is compensated as follows (Articles 17-20):

(a) Repairs—up to 75,000 DM for each individual case.

(b) Refund of special taxes and fines.

(10) Damage to economic advancement is compensated as follows (Articles 21-36):

(a) Reinstatement of civil servants and indemnification not to exceed 25,000 DM.

(b) Indemnification of other employees or workers.

(c) Indemnification and restoration of licenses to persons in the free professions.

(d) Reinstatement in the social insurance system.

(11) Payments in settlement of claims shall be made in accordance with three classes of priority. Class I includes: (a) medical treatment; (b) annuities for incapacitation or as death benefits; (c) pensions to civil servants; (d) payments to employees and workers and to members of the free professions; and (e) half of the indemnification for deprivation of liberty. Class II includes: (a) balance of payment for deprivation of liberty; (b) up to 10,000 DM of payments for damage to property, fines and taxes, and payments to civil servants, workers, and professionals not covered in Class I. Class III includes all remaining payments. Payment of Class I and II Claims shall be completed within five years after the effective date of this law, and all payments are to be completed by 1960 (Articles 38-39).

(12) Each Land is instructed to establish:

(a) a general filing agency with which claims against the Land can be filed;

(b) appropriate authorities entitled to represent the Land (Fachbehoerden);

(c) authorities to examine the claims and grant payment in settlement thereof (Guetebehoerden); and

(d) claims courts established in accordance with United States Military Government Law No. 59.

A coordinating committee composed of leading restitution officials from all Laender of Western Germany has been established in Munich. It is the purpose of this committee to consider all major problems in connection with General Claims legislation in order to bring about inter-zonal harmonization of ordinances and directives. Agreements reached by the committee are, however, not binding upon the Laender, which are free to issue implementations according to their own decisions. The present discrepancies in general claims legislation, and in its implementation, would seem to indicate that this committee has not been successful to any marked degree in accomplishing its purpose.

Under the provisions of the Interim Awards Laws, approximately 42,700,000

DM were paid out in three years between promulgation of these laws in 1946 and enactment of the General Claims Laws in 1949. A considerable amount of this sum will, of course, count toward final settlements under the General Claims Laws.

Between the coming into force of the General Claims Laws and March 31, 1950, petitions totalling 156,729 were received by claims offices in the four Laender. As of the end of March, 1950, payments had been made in the amount of approximately 30,000,000 DM. By October, 1950, these totaled about 100,000,000 DM. Approximately 23,000,000 DM of the 30,000,000 DM were paid in the form of advance payments, mostly for deprivation of liberty, based merely on a cursory examination of claims. Claims actually processed and adjudicated by settlement authorities (Gueteberhoerden) totalled approximately 6,800 and payments of approximately 7,000,000 DM were made. These adjudications and payments were made in Wuerttemberg-Baden and Bavaria only. There are as yet no settlement authorities in Hesse and Bremen and no adjudications have been made, although some 30,000 claims have been received in Hesse and some 7,000 in Bremen.

Restitution officials believed that by June 30, 1950, the extended deadline for filing for persons outside Germany, approximately 200,000 claims would have been received. They estimate the total amount of payment to be made in final settlement of all claims at approximately 1,000,000,000 DM.

It is of additional interest to note the Immediate Aid Law—(Economic Council Ordinance No. 71-A) adopted on June 10, 1949 by the Bipartite Board for the United States and United Kingdom Zones of occupation. This law grants aid in the form of subsistence, educational aid, reconstruction aid, grants for household effects, and communal aid to persons who have suffered damage by reason of permanent loss of domicile or permanent residence, damage to property, losses through Currency Reform, or political persecution from January 30, 1933 through May 9, 1945; *provided* (a) they need help owing to the damage they have suffered, and (b) they were domiciled in the currency area on June 21, 1948 or will be released from war captivity to this area. A tax is levied on real property in the area to pay for the Immediate Aid.

In so far as this ordinance applied to political persecutees, it comes within the same general category as the general claims laws, and payments to political persecutees have been made under it. It is, of course, in force only in the United States and United Kingdom Zones and applies only to persons who are in need.

D. General Claims Legislation in Other Zones

As of the summer of 1950, while Laender outside the United States Zone had enacted various laws, ordinances, decrees, and administrative directives covering individual aspects of the problem dealt with in the United States Zone by the General Claims Laws, legislation of comparable scope to that in the United States Zone did not exist in the British Zone or in Berlin and had only recently come into effect in the French Zone.

In the British Zone, the Land Niedersachsen grants annuities for damage to life or limb inflicted on Nazi persecutees. Claimants under this law must have their domicile in Land Niedersachsen and must have been German nationals on the date when the damage was inflicted.

The City of Hamburg compensates former political prisoners in 3 per cent bonds at the rate of 150 DM for each month of detention. Claimants must have lived in Hamburg on January 1, 1949 or returned to Hamburg after that date.

All of the Laender of the British Zone have promulgated laws providing for indemnification payments to political and religious persecutees for deprivation of liberty. Persons entitled to claim under these laws must have been domiciled or must have had their usual residence in the respective Laender on January 1, 1948.

It should be pointed out that most of the legislation described in the foregoing does not apply to persecutees who left Germany before, during, or since the War or who are no longer German Nationals. This results in barring most of the surviving persecutees from becoming claimants, and reveals the laws to be more in the nature of local aid than thorough-going indemnification.

In the French Zone, the redress of wrongs resulting in damages or personal injuries not connected with the restitution of identifiable property was originally charged as a German responsibility under Ordinance No. 164. Recently, however, laws similar to the United States Zone General Claims Laws came into effect in the three Laender of the French Zone upon publication in the respective official Gazettes on May 27, 30, and 31, 1950.

E. Restitution and Compensation in Austria

Enactment of restitution and compensation legislation in Austria began at an earlier date than the enactment of the German laws. This was possible, because Austria, though occupied by the Four Powers, had a functioning Federal Government as early as 1945. There is no single law which covers all aspects of restitution or of compensation, as in Germany. Instead there is a series of laws, some of which prepared the groundwork for restitution and compensation, and others of which deal with special aspects of these problems.[6]

Preliminary legislation, part of which was enacted as early as May 10, 1945, required a census and registration of property and property rights which had been alienated arbitrarily (even though on the basis of laws and other enactments) on racial, national and other grounds in connection with the seizing of power by the Nazis.[7] Other laws authorized the Ministry of Property Control and Economic Planning to appoint public administrators for enterprises subject to registration and which might be subject to spoliation, deterioration, or decrease in value.[8]

[6] The best summary in English of these laws is contained in the pamphlet "Restitution and Compensation Legislation in Austria," by Dr. Nehemiah Robinson, published by the Institute of Jewish Affairs of the World Jewish Congress in 1949.

[7] Staatsgesetzblatt #10, May 10, 1945; BGBL 1946, #150, July 24, 1946; BGBL 1946, #166, Sept. 15, 1946.

[8] BGBL 1946, #157, July 26, 1946; BGBL 1949, #163, June 29, 1949.

The basic law upon which the whole structure of restitution legislation depends is the Nullification Law.[9] This law nullified all transactions and other actions taken during the German occupation, in connection with the German political and economic penetration of Austria, which aimed at depriving natural and juridical persons of properties and rights which were theirs on March 13, 1938 (the date of Anschluss with Germany).

The First Restitution Law[10] presaged both the subsequent Austrian laws and the German law in several important particulars. The law applied to a limited number of properties—merely covering those which were administrated by the Austrian Federal Government or by its individual States—the theory apparently being that alienated properties which were so imminently in danger of spoliation and deterioration that administrators had to be appointed could best be handled by the real owners.

This law, the intent of which was to restore properties to the former owners or heirs by virtue of the nullity of the alienation, provided that the properties were to be returned in their then present state, together with existing usufructs. Like the German law it provided that encumbrances in favor of third persons acquired after alienation were void, but could be recognized by the claimants. However (again as in the German law) encumbrances to secure payments of the Reich flight tax and special Jewish Levy were void *ab initio*. Claimants were limited to the dispossessed owner, his spouse, ascendants and descendants, brothers and sisters and their children, and other heirs of law if they were a true part of the owner's household.

The Second Restitution Law[11] which in all other important aspects was similar to the First Restitution Law, covered properties which, as a result of the initial confiscation, had become the property of the State after March 13, 1938.

The Third Restitution Law[12] covered the vast bulk of confiscated properties. In this law, while presumptions in favor of the claimant are not spelled out as they are in the German law, the same result is reached since the burden of proving that the property was not wrongly alienated is placed on the present holder by the Nullification Law. As in the German law, where the claimant was subjected to political or racial persecution by the Nazis, the present holder may show that the transfer of the property would have taken place independently of the Nazi seizure of Austria. This the present holder may do by proving that the claimant freely chose the buyer and received adequate compensation.

Claimants are restricted to the former owner, his spouse, ascendants and descendants, sisters and brothers, and other heirs of law if they formed a true part of the household of the deceased.

Other similarities with the German law are the requirement that the claimant repay to the holder that part of the consideration received which was actually at

[9] BGBL 1946, #109, May 15, 1946.
[10] BGBL 1946, #56, July 26, 1946.
[11] BGBL 1947, #53, Feb. 1, 1947.
[12] BGBL 1947, #148, June 18, 1947.

the free disposal of the claimant, and the provisions relating to personalty. The provisions regarding encumbrances are somewhat more favorable to the holder than the provisions in the German law, however, since encumbrances not expressed in money, such as easements, are retained in force.

Procedurally, the system is somewhat similar to that implementing the German law. While recognizing amicable settlements, concluded after April 27, 1945, the procedure follows the non-contentious procedures of Austrian law. Restitution Commissions are established at the District Courts, each consisting of a judge, a Chairman and vice-chairman, and assessors. The judges are appointed by the Chairman of the Appellate Court and the assessors are selected from lay-judges in commercial and labor courts. Decisions must be made by a majority of a three man group consisting of either the judge or the chairman and two assessors, one of whom must be a persecutee. Appeals from decisions of the Commission are lodged with the Superior Restitution Commission established at the Appellate Court, the composition of which is similar to that of the Restitution Commission. Appeals on the law may be carried to the Supreme Commission if the value of the restitution exceeds 15,000 schillings. Appeals to the Supreme Commission where the Superior Commission upholds the decision of the Restitution Commission are permissible only with the consent of the Superior Commission. All members of the Supreme Commission must qualify as judges and are appointed by the Chairman of the Supreme Court.

The Fourth Restitution Law[13] deals with re-registration of firm names, cancelled or changed during Anschluss directly or indirectly under Nazi compulsion.

The Fifth Restitution Law[14] deals with the restitution of the property of juridical persons which have lost their juridical identity in connection with acts of persecution and have not regained it at the time of coming in force of this law. The basic presumption of alienation exists where the participation in the entity was alienated and the loss of juridical identity was made possible through the preceding alienation of title to the shares or alienation of the property of the juridical person. Claimants are limited to former owners of the participations and their heirs as in the Third Restitution Law.

Under the law the Restitution Commission may either re-establish the juridical person or, where the Commission decides this is not in the public interest, an assignment and distribution of the property of the juridical person may be made to the claimants. However, these actions may only be taken in favor and on motion of participants of the juridical identity who at the time of its dissolution represented at least a majority of the participants.

The Sixth Restitution Law[15] deals with the restitution of patents, trademarks, and designs and with inventions by employees which were taken over by their employers on the basis of certain German legislation and registered at the German

[13] BGBL 1947, #143, May 21, 1947.
[14] BGBL 1949, #164, June 22, 1949.
[15] BGBL 1949, #199, June 30, 1949.

patent office. It also deals with the alienation and defeating of licensing arrangements. The remedies here are similar to those in the Third Restitution Law.

No provision is made in the restitution laws for the distribution of heirless assets. The reason for this is that it has always been expected that a Four Power Peace Treaty with Austria would, in some manner, cover this problem. There is a draft proposal, tentatively accepted by the Four Powers, which would provide for an equitable distribution of heirless and unclaimed assets, in such a manner that they would not escheat to the State. Details of this proposal, however, cannot be published here since, technically, the proposal is still under consideration by the Four Powers.

In addition to the foregoing laws which apply to properties and rights alienated after the period of Anschluss, there are three laws which deal with property alienated between March 5, 1933, and March 13, 1938. The first of these[16] deals with properties of democratic organizations in the political, economic and cultural fields which were confiscated or alienated without remuneration on the basis of measures inconsistent with laws in force on March 5, 1933. The law has particular application to the restoration of properties of the Social Democratic party and its associates, of the Christian Labor organizations, and of the Communist Party.

The second law[17] deals with leases to apartments and business premises, and land and buildings which belong to democratic organizations in the political, economic and cultural fields.

The third of these laws[18] deals with rights resulting from private employment lost between March 5, 1933, and March 13, 1938, on political grounds on the basis of laws and other enactments, but excludes losses resulting from National Socialist activity. Persons eligible under the law are those who lost, in whole or in part, the right to salary, severance pay, or pension.

As of the middle of 1950 under the First Restitution Act there have been almost 11,000 individual claims received by the Restitution Commissions in Austria of which some 7000 were granted, about 900 denied, about 500 withdrawn, about 2000 still under consideration, and about 400 to be reached for consideration.

Under the Second Restitution Law about 1100 claims had been received of which about 400 were granted, 200 denied, 375 were under consideration, 50 had been withdrawn, and 90 had not yet been taken up.

Under the Third Restitution Law about 33,000 claims had been filed of which almost 9000 were granted, 3200 denied, 6300 had been compromised, 1200 had been transferred to procedures under other restitution or restoration laws, and about 9400 had not yet been taken up.

The laws of Austria dealing primarily with compensation[19] apply only to citizens of Austria. These are divided into two categories, those defined as the victims of the

[16] BGBL 1947, #55, Feb. 6, 1947.
[17] BGBL 1949, #165, June 22, 1949.
[18] BGBL 1941, #208, July 14, 1949.
[19] BGBL 1947, #183, July 4, 1947; BGBL 1948, #7, Dec. 18, 1947; BGBL 1949, #148, July 14, 1949.

fight for a free democratic Austria and those who were victims of political persecution.

Included in the first category are those persons who fought for Austria either with arms or words or deeds and who between March 6, 1933, and May 9, 1945, suffered any of the following losses:

(a) Died in the struggle or in consequence of wounds, illness, imprisonment, or mistreatment;
(b) Were executed;
(c) Sustained serious health impairment in consequence of wounds, illness, imprisonment, or mistreatment;
(d) Sustained imprisonment for at least one year (or six months if the imprisonment was connected with especially serious bodily or mental sufferings) for political reasons.

In the second category are persons who, during the period from March 6, 1933, to May 9, 1945, suffered serious losses for political reasons or because of race, religion or nationality, through action of the courts, the administration, or the NSDAP and its agencies. The losses covered are:

(a) Loss of life;
(b) Deprivation of liberty for over three months;
(c) Certain impairments of health;
(d) Loss of over one half of one's previous income for at least three years;
(e) Interruption for at least three and a half years of one's education.

The claimants are limited to the persons who were injured or their spouses until remarriage, ascendants and descendants, orphaned brothers and sisters, stepparents and stepchildren (including stepbrothers and stepsisters up to the age of 24) who were dependent upon the dead person.

In the main, compensation is taken care of by the the award of special privileges, since in the light of the Austrian budgetary situation adequate amounts of money could not be obtained to compensate everybody by way of money payment. These privileges include:

(a) Special privileges in social insurance;
(b) Special privileges in reconstruction of their economic position (such as appointment to office and private employment);
(c) Special privileges in allotment of apartments and garden plots;
(d) Dispensation or reduction of certain scholastic and examination fees.

In addition, minimal annuities to provide for their subsistence are granted to those persons who suffered serious bodily injury or were otherwise incapacitated. Special medical assistance and child care are also provided.

A special Reinstatement Law[20] applies to persons whose ordinary domicile or

[20] BGBL 1947, #160, July 4, 1947.

permanent residence is in Austria, where their employment was discontinued for political or racial reasons. The discontinuance of employment either on the basis of legislative provisions or by the employee on his own volition is presumed to be on political grounds if the employee was at the time of notice or dismissal subject to political persecution, and the employer cannot prove that the employment was discontinued for other reasons.

Under the foregoing circumstances the wronged employee is to be reinstated, the conditions of employment being those prevailing in the enterprise at the time of reinstatement. However, this obligation does not exist if the employee's position was abolished before January 1, 1947, on economic or technical grounds; or his former position was held by someone not belonging to the category of disqualified persons, and an obligation of reemployment in a similar position is not warranted; or if the employee is not capable of discharging the obligation of his former employment; or if he was condemned for certain criminal acts; or if he is over 65 and is entitled to a pension. Where the employee cannot be reinstated he is given a priority to employment in a position for which he is qualified.

Where the employee is not reinstated he may claim the benefits of what is called the Seventh Restitution Law[21] which applies to persons whose rights to salary, severence pay, or annuities were wholly or in part abrogated or unfulfilled. His spouse, ascendants and descendants, brothers and sisters and their children, and heirs at law who constituted a part of the employee's household may claim if the employee be deceased. Depending upon the terms of the employment and the amount of wages, the maximum claim may not exceed 24,000 schillings, with payment of amounts exceeding 5,000 schillings distributed over a period of months, and with a minimal monthly payment of 500 schillings.

While not only the employer but his successors are liable for such payments, there are certain exemptions from such responsibility, as where the employer or his successor made the payments due the employee to a third person on the basis of obligation imposed by law. (For instance, during Anschluss certain annuity payments had to be made to the German Reich on the basis of the 11th Ordinance of the Reich Citizenship Law.)

Where compensation cannot be made in these cases or where the employer has ceased to exist and has no successors, the law declares that an official statute will provide for the possibility of receiving such payment out of the heirless property fund. This latter provision may not prove to be effective if the heirless property fund is treated in the manner now contemplated by the draft Austrian Treaty.

In addition to the foregoing, there is a special law[22] which tolls the bar of statutes of limitations where persons after February 12, 1934, were on political grounds prevented from invoking court action.

[21] BGBL 1949, #207, July 14, 1949.
[22] BGBL 1947, #40, July 2, 1947.

IV

CONCLUSION

Laws of this nature are bound to be unpopular with everybody concerned. Those who are wronged can, of course, never be made whole, and do not consider that the laws go far enough. The wrongdoers or their successors as property holders have, with possession, developed a sense of property right, and, ignoring the initial wrong committed, feel unjustly treated where they have invested time and money in the operation and managment of the property acquired by them.

Extrinsic factors, such as currency reform in Germany, tend to heighten the charge of injustice by third persons who may have acquired confiscated property in good faith. (For instance, a third party holder may have paid a claimant full value in the amount of 20,000 marks for a piece of property before conversion, while the claimant now can recapture it for only 2000 marks.)

In Germany, for instance, while the attitude of top German officials connected with the program is thoroughly realistic, and recognizes fully that the Restitution program must be carried out, there have been times when Restitution programs in certain Laender declined in output in terms of number of cases processed. (In the last half of 1950, however, output materially increased.) There have also been formed so-called Restitutor Organizations in the three zones of Western Germany which take the line that the existing laws are not fair, that present programs should be suspended, and that a new start should be made on a uniform Restitution Law which gives "fair" recognition to the rights of present holders.

In Austria there have been attempts made from time to time to reopen the restitution cases already settled in the favor of claimants and to set aside some 25 per cent of the unclaimed property of victims of the Nazi regime for the purpose of compensating so-called "hardship cases"—those who had acquired confiscated property during the Nazi regime in alleged good faith. But all such attempts have failed, and at the present time there seems to be little likelihood that any material changes will be made in the present Restitution Laws.

The charge has been made that both in Germany and Austria sufficient pressure was not put upon German and Austrian authorities to have the restitution cases settled quickly. But certainly, a good part of the delay in processing cases has been due to the time consumed in corresponding with overseas claimants, and their own difficulties in directing the amassing of evidence by transatlantic correspondence. And there have also been difficulties in obtaining the services of adequate numbers of people, not completely prejudiced against claimants, and otherwise qualified, to process all claims quickly.

The achievement of the United States, Great Britain, and France in obtaining the enactment and implementation of the above described laws is, notwithstanding

all criticism of the scope and effectiveness of the laws, a remarkable one. To the best of the writer's knowledge no such laws, providing for the recovery of losses to persons who were not citizens of the sponsoring countries at the time the losses occurred, have ever before been enacted. The scope of the laws themselves is remarkable concerning both the kind and degree of the wrongs to be remedied. However well—or poorly—these laws have worked, they constitute an important and useful precedent in the development of world law.

TO WHAT EXTENT SHOULD CONGRESS APPROPRIATE TO DISTRIBUTE THE BURDEN OF WAR LOSS, GIVEN THE INSUFFICIENCY OF WAR REPARATION

C. JOSEPH STETLER*

This discussion is predicated upon the conclusion that Congress should take some affirmative action to satisfy war losses, given the insufficiency of reparation. The basis for that conclusion and the question of the extent of the satisfaction to be afforded involve a variety of considerations. The preponderance of these factors are matters of record; however, the recommendations and suggestions offered are based on my personal appraisal of the obligations of our Government in the matter and the most effective manner of providing relief.

It is true that there is no definite legal obligation, under recognized concepts of international law, which requires a government to secure indemnification for the war losses of its nationals. Further, it cannot be flatly asserted that the settlement of such losses is more compelling than the many social and economic considerations incident to the negotiation of peace treaties and other international agreements. Still, the claims to be considered are based on violations of well-established principles of international law, and as victims of such violations, claimants have the right to expect their government to press their claims for adequate compensation.

The complex character of war losses, the diversity of responsibilities, the variety of legal means available to achieve indemnification, and the legal obstacles to surmount in the process, necessitate a complete governmental inquiry prior to any determination as to comparative equities. Unfortunately, the obligation to conduct a comprehensive study of this type has not been fulfilled.

The Eightieth Congress did authorize[1] the preparation of a report concerning war claims by the War Claims Commission. In authorizing the preparation of the report, the importance of obtaining an overall picture of war claims before attempting to provide for their settlement was apparently recognized for the first time. This recognition is expressed in the language of the Interstate and Foreign Commerce Committee of the House of Representatives, in reporting the bill which became Public Law 896, 80th Congress, wherein it was stated:

> The question of war claims and debt claims is too complex to be approached by the Congress on a piecemeal basis . . . the subject in its entirety must be studied thoroughly before any intelligent action can be taken by the Congress with respect to any particular aspect of war claims and debt claims.[2]

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[1] Sec. 8, Pub. L. No. 896, 80th Cong., July 3, 1948 (62 STAT. 1240).

[2] REPORT OF HOUSE INTERSTATE AND FOREIGN COMMERCE COMMITTEE ON H. R. 4044 (REP. NO. 976, 80th Cong.).

However, the personnel and time necessary to achieve a truly complete survey were not provided. As the War Claims Commission pointed out in its report, if an exhaustive survey is desired, it will be necessary to provide adequate time and sufficient funds to accomplish the task.

Aside from the problem of what claims should be paid and the equitable treatment of various types of claimants with respect to priorities, there is also involved the fundamental problem of the ultimate source and amount of the funds to be used for satisfaction. This problem is intimately connected with the reparation to be paid by the German and Japanese governments, and the burdens in general which the economies of these two countries may be expected to bear.

The reparation problem is and has been one of the most important and pressing questions with which representatives of this Government have had to deal. Despite the reparation policies adopted to date, it is felt that the obligation still exists for our Government to acquaint itself fully with the equitable and meritorious claims arising out of the war and to insure settlement whenever possible.

If, after a thorough acquaintance with the number, types, and bases for such individual claims, it is determined that even partial satisfaction through reparation cannot be obtained, then another source of satisfaction must be sought. Regardless of the final reparation policy adopted the moral obligation of the government to secure indemnification for certain of these claimants remains.

I

DEFINITION OF THE TERM "WAR LOSSES"

In its broadest sense the term war losses may include all costs of war. However, for the purpose of this discussion no such meaning is intended. The extent of the Congressional responsibility for providing indemnification, referred to herein, is predicated upon a more selective interpretation. This interpretation is dependent upon the existence of a recognized legal or equitable basis for the claim, a close proximity of its cause to the war, existence of an obligation on the part of the government to furnish protection to the claimant, and the non-existence of a satisfactory measure or means of relief.

The language expressing the distinction in international law between "war losses" and "war claims" varies from source to source, but the controlling idea is that actions, when performed in the ordinary conduct of hostilities, occasion no duty to pay damage for injuries resulting therefrom, whereas acts not normally incident to hostilities do give rise to such a duty.[3]

There is no intention to impute any obligation with respect to those war claims which have already been recognized and settled through the numerous domestic and international measures adopted during and after World War II.

[3] 5 G. H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 633-634 (1940); 2 MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1384, 1421, 1434 (1937).

II

EQUITABLE AND LEGAL BASES FOR WAR CLAIMS GENERALLY

The principal bases for claims arising out of World War II are to be found (a) in international agreements, treaties, conventions, and exchanges of notes; (b) in existing domestic law of the United States; and (c) in implicit principles, sometimes called the international common law, which govern the behavior of civilized nations.

The existing body of international law is reasonably clear on such matters as the violence permissible to belligerents, the conduct of seizure, the limitation of devastation, retaliation, and ruses, the treatment of enemy aliens and alien property, and the treatment of the wounded and prisoners of war.[4] It is the behavior falling outside of these and similar well-defined limitations, however, which creates difficulties in the classification and evaluation of war claims.

III

TYPES AND CATEGORIES OF ENFORCEABLE WAR CLAIMS

It is well established that enemy governments owed certain obligations to the person and property of members of the United States Armed Forces, and the United States civilians within their territories.

Thus, the claims of the United States nationals against enemy governments are individual claims based on the specific nature and degree of maltreatment received, and, therefore, are the property rights of such individuals. There can be little doubt, in the face of overwhelming evidence, of the wholesale violation of the written and implied rules of warfare. The brutality and malicious deprivation of human necessities, and life itself, practiced by enemy governments, have been established beyond any doubt, not only by the testimony of the thousands who suffered at their hands, but also by the wealth of written evidence which has been uncovered since the termination of hostilities.

The results of these violations are likewise well established. The fact of malnutrition and undernourishment in virtually all of the camps where American military or civilian personnel were detained in World War II has been established. The degree of malnutrition varied, of course, with each camp and with the length of time each individual was detained. The wanton destruction, confiscation, and misappropriation of the property of the United States nationals has also given rise to innumerable property claims.

For present purposes the meaning of war losses is restricted to the following types of claims:

1. *Claims based on death, personal injury, detention, etc.*

(a) Claims by prisoners of war and civilian internees or their survivors.

Loss of life, not the result of natural causes or combat activities.

[4] 6 HACKWORTH, *op. cit. supra* note 3, at 175-259.

Improper treatment, including starvation; cruelty, such as physical violence and inhuman treatment; injuries; forced labor; inadequate housing, medical care, clothing, and sanitary facilities; and denial of proper pay and privileges.

After effects of imprisonment, including permanent disability or impairment of health, physical or mental, resulting from imprisonment.

(b) Claims by military personnel or civilians who went into hiding in order to avoid capture or internment.

2. *Claims based on property loss, damage, etc.*

(a) Loss or destruction of property, real or personal.

(b) Damage or injury to property, real or personal.

(c) Seizure, requisition, or removal of property, real or personal.

(d) Claims arising out of unusual expenditures occasioned by the war.

(e) Denial of use of property, real or personal.

IV

PRESENT SOURCES OF RELIEF AVAILABLE

The extent to which claims arising out of World War II have been or may be satisfied is extremely difficult to determine with precision because of the scope of existing international agreements and foreign and domestic laws, the piecemeal manner of their negotiation or enactment, and the variety of definitions of the term "war claims" which have been adopted.

With respect to domestic legislation, the machinery which existed prior to the war for accepting and settling claims against the Government was utilized during the war and, in certain instances, is still functioning. In addition, numerous temporary and emergency measures were adopted during and after the war which also deal in part with the recognition, receipt, and adjudication of war claims. To this extent Congress has already distributed the burden of war losses by direct appropriation.

A search of the Statutes at Large since the Seventy-Fifth Congress indicates that approximately fifty Public Laws have been enacted which in some manner recognize and provide for the satisfaction of war losses. This legislation can be categorized generally as War Insurance Legislation, Military and Naval Claims Legislation, Rehabilitation, Indemnification, and Relief Legislation, and War Contracts Legislation. These categories do not include, of course, the various acts passed in the last ten years for the benefit of veterans. It is questionable, however, whether the majority of such enactments can be considered as claims legislation in as much as they are, in a large measure, designed to grant gratuitous benefits rather than to compensate legally enforceable claims.

In considering the role of the courts in this matter, it is apparent that a volume of war claims of one type or another has been and will be the subject of private and governmental litigation. In addition to the functions of the numerous state and

federal courts, and of the Tax Court with respect to contract cases, the Court of Claims would appear to play a prominent part.

In determining the measure of satisfaction of war losses provided by international agreements and foreign legislation, one of the basic matters for consideration is a discussion of the pertinent provisions of the treaties of peace already in force. This consideration will be reserved, however, until the subject of reparation is discussed. It should be borne in mind, however, with reference to the Treaties of Peace with Bulgaria, Hungary, and Rumania, that the practice of those governments in settling war claims is not in conformity with the obligations created by the treaties.

In addition, numerous other avenues of relief, through lend-lease and war account settlement agreements and agreements on a military level, are available for intergovernmental claims, and to some extent for claims resulting from torts committed by the forces of the parties to the agreements.

Basic to any consideration of the status of war claims is the principle, well established in international law, that a claimant before seeking the interposition of his own government in his efforts to obtain satisfaction for his claim must first exhaust whatever local remedies are available in the country against whose government his claim lies.[5]

Exceptions to this principle have been recognized, where justice is wanting; where local remedies have been superseded; where the remedy is insufficient; where unjust judgments have been rendered; or where unjust discrimination is practiced against such nationals.[6]

In the majority of instances the availability of satisfactory settlement through foreign legislation or local remedies is definitely limited. There are governments, however—for example, The Netherlands—which have developed a fairly comprehensive system for satisfying war claims relating to property loss or damage. In these instances an avenue of relief is available and must be pursued before relief can be sought through our government's intervention.

V

PRECEDENTS FOR UNITED STATES WAR CLAIMS POLICY

The development of American principles of protection applied to national and foreign claimants has been reflected in our past international arbitrations. This development has been of wide influence and consonant with the legal philosophy of this nation to do what is right and just. Reference to the authorities[7] will reveal in detail the history, jurisdiction, and decisions of such tribunals to which the United States was a party.

Settlement of war claims and the affording of relief to nationals of the United

[5] 6 JOHN B. MOORE, A DIGEST OF INTERNATIONAL LAW §987 (1906).

[6] MOORE, *op. cit. supra* note 5, §§988 through 992.

[7] 1 JOHN B. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY (1898).

States suffering as a result of war have generally been effected by the creation of international tribunals. Despite the fact that the handling of claims arising out of earlier wars, in terms of number and value, was relatively simple, their settlement has nevertheless usually been accompanied by prolonged and discouraging delays.

In the interest of sound international relations and for the immediate equitable compensation of the claims of our nationals, it seems that the method of settlement is secondary in importance to the need for some settlement, whatever it may be.

VI

UNITED STATES POLICY FOLLOWING WORLD WAR I

Under date of July 2, 1921, the Congress declared the first World War between the United States and Germany ended. By the same action, all of the rights of the United States and its nationals under the armistice were reserved, and the United States was permitted to retain certain enemy property held by it.

A month later, by the Treaty of Peace with Germany,[8] signed at Berlin, August 25, 1921, and proclaimed by the President, November 14, 1921, the United States was granted all of the rights and privileges specified in the Act of July 2, 1921, as well as all of the rights and advantages stipulated in the Treaty of Versailles which were to be accorded by Germany.

Annex I of the Treaty of Versailles of June 28, 1919, set forth a detailed list of the types of recognizable claims of the Allied or Associated Powers for which Germany would be responsible.

As an outgrowth of the above-referred-to treaties, the United States and Germany signed the Executive Agreement of August 10, 1922,[9] agreeing to the establishment of a Mixed Claims Commission to determine the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty of Berlin.

The first article of that Treaty set forth the categories of claims which were to be handled by the Mixed Claims Commission in much more general form than did the Treaty of Versailles. These categories were as follows:

(1) Claims of American citizens arising after July 31, 1914, in respect to damage to, or seizure of, their property, rights, and interests, including any company or association in which they were interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals had been subjected with respect to injuries to persons, or to property rights and interests, including any company or association in which American nationals were interested, after July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

[8] 42 STAT. 1939, 67th Cong., 2d Sess. (1921).
[9] 42 STAT. 2200, 67th Cong., 2d Sess. (1921).

It was not, however, until the passage of the Settlement of War Claims Act of 1928,[10] that provision was made for the payment of the awards of the Mixed Claims Commission. Under section 4 of that Act, the awards entered by the Commission were divided, for the purpose of establishing a priority of payment, into three classes: Class I, awards on account of death and personal injuries; Class II, awards, other than for death and personal injuries, of $100,000 or less stated as of January 1, 1928; and Class III, all awards, other than for death and personal injuries, in excess of $100,000 stated as of January 1, 1928.

During the life of the Mixed Claims Commission a total of 20,433 claims were filed. Awards were allowed in about one-third or 7,201 cases, involving one of the three classes of claims indicated above. The breakdown as to the number and value of such awards plus interest is as follows:[11]

Class	*Number*	*Value of Award Plus Interest (September 30, 1940)*
I	539	$ 5,202,348.45
II	6165	28,092,510.92
III	317	220,979,299.52
Total	7021	$254,274,158.89

It is interesting to note that as recently as the last session of Congress a bill[12] was introduced to authorize the appropriation of the sums necessary to pay the balance of certain adjudicated but unpaid awards of the Mixed Claims Commission. The best available information indicates that the principal and interest due in such cases amounts to approximately $98,000,000.

Hearings were held on the bill, but it was not enacted into law.

VII

SOURCES OF FUNDS FOR PROVIDING INDEMNIFICATION

It is possible that there are other sources of funds available for indemnification; however, consideration here has been reserved to four: Reparation; Proceeds from Liquidated Vested Enemy Assets; Transfer of Miscellaneous Funds; and General Legislative Appropriations. The distinctive rationale incident to the use of each of these sources indicates an individual treatment.

A. Reparation

The ramifications of the problem incident to the exaction of reparation from a defeated nation are many. Although our position has been made rather clear by a succession of events, meetings, pronouncements of policy, and agreements, it will not become a completely closed issue as long as the Treaties of Peace with Germany and Japan remain to be negotiated.

[10] Pub. L. No. 122, 70th Cong., March 10, 1928 (45 STAT. 254).

[11] FINAL REPORT OF H. H. MARTIN, ACTING AGENT OF THE UNITED STATES BEFORE THE MIXED CLAIMS COMMISSION, UNITED STATES AND GERMANY 93 (1941).

[12] H. R. 6074, 81st Congress.

Although there is a strong moral objection to the idea of a defeated enemy escaping obligation for the property damage, destruction, and the human suffering which it caused during a war, no one seriously suggests that we adopt a policy which is going to deprive the nationals of Germany and Japan of the means of providing for themselves. First, it is not our nature; and secondly, history has demonstrated that the exaction of heavy reparation is accompanied with adverse after effects.

The indemnity exacted by Germany from France under the Treaty of Frankfurt in 1871 was roughly one billion dollars. The year following this settlement was marked by a period of prosperity in France and depression in Germany. These facts give color to the story that Bismarck, in commenting upon the economic status of the two countries, disclosed that the next time he defeated France he would demand that Germany be permitted to pay the indemnity.

No attempt will be made here to discuss the present or future economic ability of the German or Japanese Governments to pay reparation. However, it is felt, as previously stated, that regardless of the considerations which dictate the final terms of the peace settlements, the obligation still exists for our Government to determine the equitable and meritorious claims arising out of the war and to insure settlements from this source in so far as possible.

The attempts to exact reparation from Germany after World War I are largely responsible for the unpleasant connotations attached to that word. Initially the United States vacillated between a policy favoring the disclaimer of reparation due under the Treaty of Versailles and its ancillary treaties, and an occasional switch to the policy preferred by the participating Allied Powers. Ultimately a reparation debt was created, but despite German overtures it remained always just a debt.

The sums eventually paid in reparation were much more than balanced by German net borrowing of capital and credit from the rest of the world. This condition continued until, in the midst of a world depression, it became apparent that the only logical course was the complete abandonment of reparation.

In their report on the Crimean Conference, dated February 11, 1945, the Big Three for the first time issued a statement on reparation. A special section of the Crimea Declaration devoted to the problem provided, with respect to reparation from Germany:

> We have considered the question of the damage caused by Germany to the Allied Nations in the war and recognized it as just that Germany be obliged to make compensation for this damage in kind to the greatest extent possible. A commission for the compensation of damage will be established. The Commission will be instructed to consider the question of the extent and methods for compensating damage caused by Germany to the allied countries. The Commission will work in Moscow.

Although the Reparation Commission was activated and accomplished its preliminary work, appreciable progress was not made until the Potsdam Conference. The agreement arising out of that Conference contained an interim program of reparation from Germany.

Subsequently, the United States, the United Kingdom, and France divided their reparation shares, derived from the Potsdam agreement, with fifteen other nations by the Paris Agreement on Reparation from Germany, January 14, 1946. The term "reparation" within the context of such report and agreements has the meaning of compensation for damages. Further, it appears clear that whatever reparation is to be made will be made primarily in kind and not in money.

The Crimea Declaration and the Potsdam Agreement also postulated, as a basic principle of reparation policy, that distribution of German reparation assets was to be based on the extent to which an Allied Power suffered from war damage and the extent of its participation in actions leading to victory. As a result of this principle, a special share of German reparation payments was provided for the Union of Soviet Socialist Republics and Poland on the one hand and the other Allied Powers on the other. Within the latter group is included the United States.

As a result of a report made by the Economic Cooperation Administration our Government and the Governments of France and the United Kingdom entered into an agreement on March 31, 1949, which provided for the removal of a limited and specified number of plants. A further agreement, known as the Petersburg Protocol, was entered into on November 22, 1949, between the High Commissioners of the three powers occupying the western zones of Germany and the Chancellor of the German Federal Republic. By this Agreement, certain specified industrial plants were marked for removal. Agreement was also reached precluding further removals for reparation.

The fact that our present stated policy, as disclosed by the report of January 14, 1949, and the aforementioned agreements, precludes further reparation removals from Germany in all probability means that reparation from Germany will be insufficient to meet war claims of United States nationals against Germany.

The Allied Powers by the Potsdam agreement further stated that the basic policy of reparation from Japan would be reparation in kind sufficient to end the Japanese war potential but not so oppressive as to disrupt the basic economy of the country. This concept of reparation was accepted by the Japanese Government under the terms of the surrender of September 2, 1945.

Initially, the Far Eastern Commission, which came into being as a result of decisions reached at the Moscow meeting of the Foreign Secretaries on December 27, 1945, promulgated a series of policy decisions concerning reparation removals of industrial property from Japan. This program failed to make progress because of the absence of an agreement among the governments potentially entitled to a reparation share as to the percentage of reparation to be allocated. Efforts of the United States to end the impasse were unsuccessful.

In a statement[13] outlining the position of the United States concerning the future exaction of reparation from Japan, General Frank R. McCoy stated, in part:

[13] Statement, dated May 12, 1949, by General Frank R. McCoy, United States representative on the Far Eastern Commission, concerning Japanese reparation and level of industry. (Italics supplied.)

It is the considered view of the United States Government that this objective does not require that Japan's production for peaceful purposes be limited or that limitations be imposed on levels of Japanese productive capacity in industries devoted to peaceful purposes. This belief, coupled with the evidence of Japan's present economic plight and the difficult problems Japan will face in the future in attaining levels of industrial production and foreign trade sufficient to support its people even at minimum levels, *render it clearly advisable in my Government's view that Japan be permitted to develop its peaceful industries without limitation.* The problem facing us is not one of limitation of Japan's peaceful industries but of reviving these industries to provide the people's barest wants.

The effect of this pronouncement was the rescission by the United States of an earlier interim directive on reparation removal and, in effect, the termination of the entire program for the removal of reparation from Japan.

The Paris Agreement on Reparation from Germany, which became effective January 14, 1946, was participated in by the United States and 17 other nations. It provided for the percentage participation of the Allied Powers in German assets subject to reparation.

The United States, under the terms of the Paris Agreement, is to receive stated percentages of all German assets subject to reparation payments. In addition, the United States of America is to retain control over German assets within its jurisdiction which are now subject to the control of the Office of Alien Property, Department of Justice.

The Paris Agreement further stipulated that the signatory governments agree among themselves that their respective reparation shares are regarded by them as covering all of their claims and the claims of their nationals against the former German Government and its agencies, which claims arose out of the war and are not otherwise provided for.

It is worth noting that although the reparation shares assigned by the Paris Agreement are based, in part, on a consideration of private losses resulting from war damage to property, the allocation of reparation is made, not to the individuals, but to the several governments involved. The compensation of private persons who hold claims against Germany arising out of the war is a matter for the Allied Governments to handle in accordance with their respective governmental procedures.

1. *Peace Treaties Negotiated to Date*

A general peace conference of the twenty-one nations which participated in the war against Germany, met in Paris on July 29, 1946, to consider the terms of Peace Treaties with Italy, Hungary, Rumania, and Bulgaria. This conference had its origin in the Potsdam Conference.

In discussing the stipulations concerning the recognition and settlement of war claims contained in the peace treaties negotiated to date my comments will be extremely general in nature. No attempt is made herein to outline all of the pertinent clauses of each of the treaties.

a. Italy. The Treaty of Peace with Italy[14] provides for the restitution of property to the United States[15] and for the indemnification of the United States or its nationals for loss or damage to property in Italy, territories ceded by Italy, and the Free Territory of Trieste.[16]

Those eligible for restoration of property and for indemnification for damage to, or loss of, property include individuals who were American nationals, corporations, or associations organized under the laws of the United States at the time the Treaty came into force, provided that such individuals, corporations, or associations were also American nationals on September 3, 1943, the date of the armistice with Italy. Individuals, corporations, or associations which were treated as enemy under the laws in force in Italy during the war are also eligible claimants.[17]

The general policy of the indemnification and restoration provisions of the Treaty of Peace with Italy is to provide for the restoration or return of the property, legal rights, and interests of the United States of America and its nationals as such existed on June 10, 1940.

In the event that disputes arise under the clauses relating to indemnification and restitution, the final decision is to be made by a conciliation commission.

On August 14, 1947, a "Memorandum of understanding regarding settlement of certain wartime claims and related matters" and a "Memorandum of understanding regarding Italian assets in the United States of America and certain claims of United States nationals" were signed in Washington by Robert A. Lovett, Acting Secretary of State, on behalf of the United States, and Ivan Matteo Lombardo, Chief of the Italian Economic and Financial Delegation, on behalf of Italy.

These memoranda and certain supplementary notes, ordinarily referred to as the "Lombardo Agreement," generally reaffirmed provisions of the Peace Treaty, and provided specific detail as to the interpretation of some of the broad terms contained therein. Both nations agreed to waive certain enumerated claims which might arise under the Treaty.

Provision was also made, under certain conditions, for the return of vested property and the unblocking of frozen Italian assets. In return, the Italian Government agreed to place at the disposal of our Government the sum of $5,000,000 to be used in meeting war claims of United States nationals for which there was no other provision in the Treaty of Peace or in the agreement.

The Italian-American Conciliation Commission was created according to Article 83 of the Treaty of Peace with Italy. Any disputes involving the United States or its nationals which may arise under Articles 75 or 78 of the Treaty, or under certain specified annexes, will be referred to this Commission which consists of one representative from each of the two Governments. If within three months after the

[14] This Treaty was signed at Paris on February 10, 1947, and came into force on September 15, 1947, 61 STAT. 1245, 80th Cong., 1st Sess. (1947).

[15] Art. 75, Treaty of Peace with Italy.

[16] Art. 78, Treaty of Peace with Italy.

[17] Art. 78, Treaty of Peace with Italy.

dispute has been referred to the Conciliation Commission, no agreement has been reached, either Government may ask for the addition of a third member to the Commission, selected by mutual agreement from nationals of a third country.

b. Bulgaria, Hungary, and Rumania.[18] The Treaties of Peace with the former enemy governments of Bulgaria, Hungary, and Rumania provide for the restitution of property to the United States,[19] and for the indemnification of American nationals who suffered loss or damage to their property in territories of such former enemy governments.[20]

Individuals who are American nationals, or corporations or associations organized under the laws of the United States, and who were nationals at the time the Treaties of Peace came into force are eligible for indemnification, provided that such individuals, corporations, or associations were also American nationals on the respective dates of the armistices with the former enemy governments.[21] Individuals, corporations, or associations which were treated as enemy under the laws in force in the territories of the former enemy governments during the war are also eligible claimants.[22]

In the Treaties with the Governments of Bulgaria and Hungary, the property subject to indemnification is defined as all movable or immovable property, whether tangible or intangible, including industrial, literary, and artistic property. Also included are rights or interests of any kind in property.[23] In the Treaty with the Government of Rumania, in addition to the above property, there are also included certain seagoing and river vessels and the equipment thereon.

The general policy of the indemnification and restoration provisions of the Treaties of Peace with these former enemy governments is to provide for the restoration or return of the property, legal rights, and interests of the United States of America and its nationals. In the Treaty of Peace with Bulgaria the date for determining the nature, extent, and status of the rights of the Government of the United States of America and its nationals is April 24, 1941.[24] In the Treaties of Peace with Hungary and Rumania, the controlling date is September 1, 1939.[25]

In the event that disputes arise under the clauses relating to indemnification and restitution, the decision is to be made by a conciliation commission consisting of an equal number of representatives of the Government of the United States of America and of the former enemy government. Procedures are also established for the selection of a third member of the Conciliation Commission if agreement cannot be reached.[26]

[18] Bulgaria (61 STAT. 1915); Hungary (61 STAT. 2065); and Rumania (61 STAT. 1757). All three Treaties were signed at Paris on February 10, 1947, and came into force September 15, 1947.

[19] B Art. 22; H. Art. 24; R Art. 23.

[20] B Art. 23; H. Art. 26; R Art. 24.

[21] Armistice with Bulgaria, October 28, 1944; with Hungary, January 20, 1945; with Rumania, September 12, 1944.

[22] B Art. 23; H Art. 26; R Art. 24.

[23] B Art. 23; H Art. 26.

[24] B Art. 23.

[25] H Art. 26; R Art. 24.

[26] B Art. 31; H Art. 35; R Art. 32.

2. *Prospective Treaties with Germany, Japan, and Austria*

a. Germany. Although the Treaties of Peace already negotiated may be looked to for guidance in any estimate of the probable nature of the Treaty of Peace with Germany, further special factors inherent in Germany's wartime and post-war position necessitate certain differences. Germany was the principal European aggressor, and, consequently, she is responsible for the greater portion of the claims which have arisen as a result of World War II.

The preceding discussion of the general policy of the United States regarding reparation and the specific provisions of the Paris Agreement indicate rather clearly what to expect in the way of claims settlements out of reparation derived from a Treaty of Peace with Germany. However, one of the major obstacles to any evaluation of the probable terms of a Treaty of Peace with Germany lies in the interpretation of the waiver stipulated by the Paris Agreement. If the waiver is deemed to be restrictive, our present policy on reparation in essence forecloses any possibility that the Treaty of Peace with Germany will provide effective compensation for war claims.

The extent to which this waiver is operative is in doubt in view of the fact that it is qualified so as to be without prejudice to a later determination of the forms, duration, and total amount of reparation to be made by Germany and the rights which a signatory government may have to the final settlement of German reparation.

b. Japan. If any substantial satisfaction of war claims against Japan is to be effected, it would appear that an essential element of any peace settlement with Japan, in so far as it relates to war claims, would be a provision setting forth the procedures necessary for the creation of a fund from which such war claims can be satisfied. This is especially important in view of the extent and nature of the personal injury claims for which Japan is liable. In addition, indemnification and restoration provisions similar to those obtaining in the existing peace treaties will also be necessary.

c. Austria. In as much as Austria was not an independent nation during World War II and was not at war with the United States, war claims arising in Austria are attributable to the activities of the former German Government. In the Foreign Ministers' declaration on Austria made at Moscow on November 1, 1943, it was stated that the annexation by Germany of Austria on March 15, 1938, was null and void, and that the intention of the Allied Powers was the reestablishment of Austria as a free and independent nation.

The then Secretary of State, James F. Byrnes, at the Council of Foreign Ministers in Paris, on May 20, 1946, announced that in accordance with the Agreement made at Potsdam in August of 1945, no reparation would be exacted from Austria.

B. Proceeds from Liquidated Vested Enemy Assets

By the passage of the Trading With the Enemy Act of 1917,[27] power was dele-

[27] Pub. L. No. 91, 40 STAT. 411, 65th Cong., 1st Sess. (1917).

gated to the President and the Alien Property Custodian to seize and control all property located in the United States owing or belonging to an enemy government or enemy national. These powers were exercised by our government during World War I and a large amount of enemy property was seized and converted to the use and benefit of the United States. However, in the post-war period the policy was softened and almost 80 per cent of the property seized was returned to its former owners.

During World War II the United States again exercised its power under the Trading With the Enemy Act. Pursuant to the provisions of sections 12 and 13 of the War Claims Act of 1948,[28] the War Claims Fund was established, consisting of certain proceeds of liquidated vested enemy property.

In a statement by Mr. Harold I. Baynton, then Acting Director, Office of Alien Property, Department of Justice, dated March 24, 1950,[29] it was disclosed that the present net equity of the Office of Alien Property in vested property is $344,900,000. This net equity is deemed to be subject to a probable payment of debt and title claims of between $35,000,000 and $50,000,000. Pending cases in the process of litigation, under section 9(a) of the Trading With the Enemy Act of 1917, as amended, amount to $125,000,000. On the basis of these figures, it appears that between $169,900,000 and $184,900,000 will eventually be available for transfer to the War Claims Fund.

However, it is believed that these estimates are low in the light of two factors. First, it is extremely doubtful that all of the pending litigation under section 9(a) will result in the return of vested property. Therefore, in all probability, at least a portion of the aforementioned $125,000,000 will eventually be available for transfer to the War Claims Fund. In addition, the Office of Alien Property is presently vesting additional assets at the rate of approximately $25,000,000 per year. Undoubtedly, a portion of the newly vested assets will also eventually be available for transfer to the War Claims Fund.

By the passage of the War Claims Act of 1948, Congress, in addition to authorizing a study of war claims, provided for the payment of claims (a) for detention, disability, and death by certain civilian internees who were interned or in hiding in specified Pacific areas; (b) for compensation by prisoners of war who did not receive adequate rations in accordance with the terms of the Geneva Convention of July 27, 1929; (c) for reimbursement by certain religious organizations functioning in the Philippines, for services and supplies furnished to United States forces or United States citizens; and (d) for reimbursement or cancellation of repatriation expenses paid or owing by certain persons to the Department of State.

It is estimated that the cost of settling these claims will approximate $150,000,000. Therefore, on the basis of current figures, it appears that from $20,000,000 to

[28] 62 STAT. 1246, 1247 (1948), 50 U. S. C. App. §§2011, 2012 (Supp. 1950).

[29] *Hearings before Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 6808, 7001,* and other bills, 81st Cong., 2d Sess. 60, 61, 62 (1950).

$25,000,000 will eventually be available for the satisfaction of additional war claims. It is possible that, by further vesting and by successful defense of section 9(a) litigation cases, there may be available a sum in excess of $50,000,000 for this purpose.

C. Transfer of Miscellaneous Funds

During the war and since the termination of hostilities, numerous miscellaneous accounts have been set up in the Department of the Treasury. Although in many instances these accounts have been merged with the general funds of the Treasury, they are of interest in exploring the possibilities for the settlement of war claims.

The accounts indicated do not reflect the previously referred to proceeds of the Office of Alien Property, nor is this list intended to include all of the accounts of this type. They are merely examples of the miscellaneous funds in question.

In view of the fact that all of the amounts listed represent income from either wartime governmental activities or proceeds from reparation from enemy countries, it would seem that consideration might justifiably be given to their use for the satisfaction of war claims. Up to date information concerning the status and amount of these funds is difficult to obtain. For that reason approximations or the latest available figures have been used:

Surplus of War Damage Corporation	$210,598,722.38
Proceeds of German property seized in Japan	275,000.00
Proceeds from sale of German ships	2,334,233.00
Proceeds of German property seized in Spain	1,597,512.82
Surplus of funds to cover civilian war hazards	3,900,436.35
Amount deposited by Italy pursuant to the Lombardo Agreement	5,000,000.00
Total	$223,705,904.55

D. General Legislative Appropriations

As indicated earlier Congress has already by some fifty Congressional enactments appropriated, in some measure, to distribute the burden of war losses. In breaking down this legislation into categories, reference is made to War Insurance Legislation; Military and Naval Claims Legislation; Rehabilitation, Indemification and Relief Legislation; and War Contracts Legislation. Although all of these types represent Congressional distribution of war loss, it is believed that specific enactments falling under the headings Military and Naval Claims Legislation and Rehabilitation, Indemnification and Relief Legislation are most representative.

1. *Military and Naval Claims Legislation*

The Military Personnel Claims Act of 1945,[80] as amended, authorized the Department of the Army to compensate its civilian employees and military personnel for certain damage to or loss, destruction, capture, or abandonment of personal property incident to their service.

[80] 59 STAT. 225.

Under a later Act, December 28, 1945,[31] the power of the Department of the Navy to settle claims was made analogous to that of the Department of the Army under the Act, as amended.

Under the Foreign Claims Act,[32] provision is made for settlement of claims for damages, personal injury, or death caused by members of the armed forces in foreign countries. Claims resulting from action by the enemy or resulting directly or indirectly from any act of our armed forces engaged in combat are excluded.

An Act of July 3, 1943,[33] as amended, authorized the Secretary of the Army or his designees to settle certain property and personal injury claims not cognizable under the Foreign Claims Act or the Military Personnel Claims Act. Under this Act, as amended, certain claims may be settled for damage to, or loss or destruction of property or personal injury or death, settlement of which is not precluded by the Federal Tort Claims Act, the Military Personnel Claims Act, or the Foreign Claims Act. Claims for personal injury or death are allowable only to the extent of medical, hospital, and burial expenses.

2. Rehabilitation, Indemnification, and Relief Legislation

Numerous legislative enactments could properly be discussed under this heading; however, for purposes of brevity only three will be considered.

a. Japanese Evacuees. It will be remembered that during the early stages of World War II, it was considered necessary for security purposes to put into effect a mass evacuation program of all persons of Japanese ancestry from the west coast of the United States to certain camps in the interior.

The American-Japanese Evacuation Claims Act was enacted on July 2, 1948.[34] This Act authorized the settlement of claims of persons of Japanese ancestry for damage to, or loss of, certain real or personal property, which damage or loss was a reasonable and natural consequence of the evacuation program.

b. Guam. Legislation providing relief for the residents of Guam was enacted on November 15, 1945.[35] Provision was made for settlement of certain property claims and meritorious death claims arising from hostilities or capture by the enemy or from non-combat activities of the United States Naval Forces.

Since the war, the Department of the Navy has provided an additional measure of relief for the inhabitants of Guam through the construction of Navy projects. However, no organized program for reconstruction of damaged or destroyed civilian facilities has been undertaken.

c. Philippines. The first important step taken by the Congress to repair damage caused by the war in the Philippines was the passage of the Philippine Rehabilitation Act of 1946,[36] which established the Philippine War Damage Commission.

[31] 59 STAT. 662.
[32] Act of January 2, 1942, Pub. L. No. 393, 77th Cong. (55 STAT. 880).
[33] 57 STAT. 372.
[34] Pub. L. No. 886, 80th Cong. (62 STAT. 1231).
[35] Pub. L. No. 224, 79th Cong. (59 STAT. 582).
[36] 60 STAT. 128, 50 U. S. C. App. §1751-1806 (1946).

The Philippine War Damage Commission was authorized to adjudicate and pay up to a maximum of 75 per cent of the determined allowable amount for damage to certain types of tangible property. The remaining 25 per cent was to be paid by means of reparation or indemnity received by the United States from Japan on account of war losses in the Philippines, after the United States had reimbursed itself for funds appropriated under the Act.

Provision was also made for the construction and repair of certain public works such as highways and port facilities and the establishment of survey and training projects in the fields of public health, sea and air navigation, weather facilities, and coast and geodetic surveys.

VIII

CONCLUSIONS

It has often been suggested that provision for the payment of war claims, at least those in the high-priority groups, be made by direct appropriation from the general funds of the Treasury, without regard to possible reparation payments or the proceeds of liquidated enemy assets. It has been urged that such an approach would assure that any moral obligation of the Government to insure compensation of its nationals for war damage would not be dependent upon the uncertainties of future financial settlements with enemy countries or ultimate realization on vested enemy property.

Certainly it is idle to contemplate that more than a fraction of the costs of World War II and the claims arising out of it can be settled from enemy property now held or from indemnities later recovered. However, it is believed that before complete reliance for the settlement of war claims is placed upon direct Congressional appropriation, a vigorous attempt must be made to settle the maximum number of claims from the two sources indicated.

In considering the question of national policy as to enemy assets which have been blocked or vested, cognizance must be taken of the many bills which are pending in Congress which, if enacted, would dissipate the amount potentially available from this source for the settlement of war claims.

With the passage of time there is a growing pressure to again adopt the "soft" attitude which we fostered toward Germany shortly after World War I and to ignore and write off the war claims of American nationals. It is hoped that Congress will adopt a cautious attitude in this regard and that, before acting on the many pending bills which would amend the Trading With the Enemy Act, it will reacquaint itself with the uncompensated personal suffering and economic injury which resulted from the war.

Reparation as a source of settlement, as already indicated, is certainly not a closed issue. Before it becomes a closed issue, however, we should learn the complete story regarding the types, volume, and value of war claims. It is doubtful that in

the settlements negotiated to date adequate consideration has been given to the personal injury, death, and property claims of American nationals.

It should be noted in this regard that under the Paris Agreement many claims of American nationals were waived. The Paris Conference which led to this Agreement was in session for little over a month. Certainly this was a short period for sufficient thought to be given to the extent of personal injury and property claims and for the reaching of an agreement concerning their disposition.

This view seems to be buttressed by the conditions prevailing with reference to the aforementioned Lombardo Agreement. From all information available the amount of $5,000,000 which Italy gave for the settlement of war claims outside of the Treaty of Peace and the Agreement was arbitrary.

In as much as the decisions have been made to discontinue both the German and Japanese reparation programs, the rights of American nationals with reference to the obtaining of satisfaction for war losses from reparation have at least temporarily been placed in abeyance.

What then regarding the reparation payments which have already been received? What legislative proposals have been put forward since January, 1946, to implement the settlement of war claims out of the funds realized from reparation shares? What action has been taken to make available for the payment of war claims the $5,000,000 obtained pursuant to the Lombardo Agreement? Unfortunately, the answer to each of these questions is in the negative.

Although a long delay will probably elapse before the status of sovereignty will be restored to Germany, a study group has been formed for the consideration of a pre-treaty settlement of war claims. With respect to Japan, preliminary peace treaty negotiations are under way. It appears, therefore, that the question of satisfaction of war claims by reparation will soon be settled.

For these reasons it behooves us to learn the full story on war claims before reparation is foreclosed as a source of war claims settlement.

An intelligent decision on this issue, combined with a vigilant policy with respect to blocked and vested enemy property, should provide for the settlement of a number of war claims. However, any insufficiency of assets from enemy governments or from the proceeds of vested enemy property will creaty an urgent need for the formulation of a legislative program for resolving war damages. If we are diligent in our efforts to settle war losses from the sources now available, we can lessen the burden remaining for distribution by Congressional appropriations. The obligation to obtain indemnification is certain; the decision as to the amount to be settled by direct Congressional appropriation remains.

CLAIMS FOR REPARATIONS AND DAMAGES RESULTING FROM VIOLATION OF NEUTRAL RIGHTS

WILLIAM GERALD DOWNEY, JR.*

International law is generally regarded as the law for the conduct of nations and is based upon the general assent of the members of the family of nations. Its sources are custom and lawmaking treaties.[1]

Neutrality is an integral chapter of international law. It has been defined as the condition of those states which in time of war take no part in the contest, but continue pacific intercourse with the belligerents.[2] It is usually considered under two headings, the first pertaining to the rights and duties of belligerent states and of the nationals thereof, and the second to the rights and duties of neutral states and of the nationals thereof.[3] These rights and duties are correlative and neutrality can be violated by neutrals as well as belligerents.

It is the purpose of this article to discuss only the law pertaining to the *rights* of neutral states and the legal bases for claims by or against such neutral states for reparations and damages resulting from violations of such neutral rights. The remaining and by far the greater part of the international law of neutrality will be discussed only when it affects the question of neutral rights or when it may serve as a defense for alleged violations of neutral rights.

It will be noted that wherever the word "damages" is used throughout this article it is to be distinguished from the term "reparations." Damages are usually included in demands for reparations, which is the term usually employed in referring to claims for violations of neutral rights and which embraces not only monetary compensation, but all the international acts which must be taken by the offending belligerent to restore the international prestige of the offended neutral. Wherever used herein,

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[1] West Rand Central Gold Mining Co., Ltd., v. The King, [1905] 2 K. B. 391; The S.S. Lotus, Permanent Court of International Justice, 2 HUDSON, WORLD COURT REPORTS 1927-1932 20, 35 (1935); FREDERICK K. NIELSEN, INTERNATIONAL LAW APPLIED TO RECLAMATIONS 7 (1933); see GEORGE A. FINCH, THE SOURCES OF MODERN INTERNATIONAL LAW (1937), *passim*.

[2] The Three Friends, 166 U. S. 1 (1897); T. J. LAWRENCE, THE PRINCIPLES OF INTERNATIONAL LAW 582 (7th ed. 1923). In the present writer's AMERICAN MARITIME NEUTRALITY POLICY (1937), neutrality is defined ". . . as the continuation of [the] . . . state of peace by one or more nations after the original status had been altered or changed by two or more warring or belligerent nations. Presupposing the existence of a state of war, its primary purpose is to maintain the peace by keeping nations out of war and by defining the rights and duties of warring and non-warring nations." *Id.* at 12. A footnote appended thereto states that in this definition warring nations are considered as those which fight without having made a declaration of war and belligerent nations are those which fight after having made a declaration of war.

[3] LAWRENCE, *op. cit. supra* note 2, at 583-657.

the term "damages" will refer only to the monetary compensation claimed by a neutral for violations of neutral rights resulting in injury to life and property.

An interesting recent example of the above stated distinction is to be found in the *Panay* case. In December 1937, Japanese naval aviators, in the course of military operations against the Chinese forces, bombed and sank the neutral *U. S. S. Panay,* which by virtue of certain treaty rights was legally patrolling a Chinese river. As a result of this illegal act of an arm of the Japanese Government, American lives were lost and United States property was destroyed. The Government of the United States protested this violation of its neutral rights and demanded reparations, including damages for the lives lost and property destroyed. The Government of Japan immediately acknowledged its responsibility for the bombing and apologized to the Government of the United States. By way of reparations Japan agreed to punish the aviators concerned[4] and recalled and retired the admiral responsible for the bombing.[5] The Government of Japan agreed to pay damages and several months later actually paid to the United States damages in the amount of $2,214,007.36 as compensation for the injuries thereby inflicted.[6]

There are two general and basic neutral rights from which nearly all the specific and controversial rights of neutrals flow. These so-called rights are in reality only restatements of the principles of sovereignty. Reduced to their lowest common denominator, they state nothing more than the general rule that every state is the supreme authority within its own territory in time of peace as well as in time of war. Applied in the field of neutrality this age-old principle can be restated in the form of two *rights* as follows:

(1) the right to the freedom of neutral territory from belligerent attack; and

(2) the right to the freedom of neutral territory from belligerent use.

These basic rights will be discussed *seriatim* below.

It is a general principle of the law of neutrality that any violation of neutral rights constitutes an international tort, or as it is sometimes called, an international delinquency.[7] Where such rights have been protected by international conventions,[8] any violations of such conventional rights may also involve additional liability resulting from the breach of such conventional obligations. In addition to the Hague Conventions V and XIII there are many bilateral and multilateral treaties providing for the protection of neutral rights.[9] As in domestic torts, an international tort involves an obligation on the part of the tortfeasor to make reparation. The great

[4] N. Y. Times, Dec. 26, 1937, §1, p. 1, cols. 1-4; §4, p. 3, cols. 7-8. See also, JOSEPH C. GREW, TEN YEARS IN JAPAN 232-242 (1944).

[5] GREW, *op. cit. supra* note 4, at 236.

[6] See 32 AM. J. INT'L L. 579 (1938); N. Y. Times, April 19, 1938, p. 10, col. 1.

[7] 2 OPPENHEIM, INTERNATIONAL LAW 614 (6th ed., Lauterpacht, 1944); 1 GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW 294 (1947).

[8] See Hague Conventions V (36 STAT. 2310, Treaty Ser. No. 540; 2 MALLOY'S TREATIES 2290 (1910), and XIII (36 STAT. 2415; Treaty Ser. No. 545; 2 MALLOY'S TREATIES 2352 (1910)).

[9] See FRANCIS DÉAK AND PHILIP C. JESSUP, A COLLECTION OF NEUTRALITY LAWS, REGULATIONS AND TREATIES OF VARIOUS COUNTRIES (1939) (two volumes) *passim*.

difficulty in the international field lies in the fact that there are few courts available for the adjudication of international torts. Two courts which are available are the Permanent Court of Arbitration at the Hague and the International Court of Justice, formerly the Permanent Court of International Justice at the Hague.[10]

Acts in violation of the international law of neutrality are defined as those acts which are violations of the peaceful relationship between the neutral and belligerent states. Those acts would have entailed, prior to the outbreak of belligerency, the obligation to make reparations or pay damages according to the rules of customary or conventional international law as applied by an international arbitration tribunal.[11] After the end of World War I the special arbitration tribunal between Germany and Portugal adopted this definition of acts in violation of international law. The tribunal stated in its award that, while in point of time the responsibility of Germany for violations of neutral rights was limited to acts committed by Germany against allied or associated powers prior to their entrance into the war, it was immaterial, from the point of view of place of commission, whether the illegal acts were committed in Germany or in German occupied territory, whether they were committed against the neutral state or its subjects, or whether they were directed against the person or property of neutrals.[12]

1. *The right to the freedom of neutral territory from belligerent attack.* As neutral land, territorial waters, and air space are protected by this right, no acts of warfare of any kind may legally take place therein.[13]

A violation of this right may be handled in one of several ways. The neutral may protest through diplomatic channels as in the case of the *Panay, supra.* The neutral may by the use of armed force eject the tortfeasor who continues to violate neutral territory, waters or air space.[14] However, such use of force may, and frequently has, led to war between the neutral and the offending belligerent. The German violations of the neutrality of Norway, Holland, Luxembourg, and Belgium in 1940 led to war with those countries. On the other hand the German violation of the neutrality of Denmark and the military occupation of that country did not lead to war, nor did the British violation of the neutrality of Iceland and the "pacific"[15] occupation of that country lead to war. Both of these violations of neutrality were justified on the grounds of military necessity.[16] Concerning the

[10] For a short history of the Permanent Court of Arbitration, see Introduction to 1 JAMES BROWN SCOTT, THE HAGUE COURT REPORTS iii-xvi (1916); for similar information about the Permanent Court of International Justice, see MANLEY O. HUDSON, THE WORLD COURT 1921-1934 1-9 (4th ed., rev. 1934).

[11] Goldenberg v. Germany, 1928, Special Arbitration Tribunal Between Rumania and Germany, 1 ZEITSCHRIFT FÜR AUSLANDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT [hereinafter Z. R. V.] 87, 93 (Germany 1928).

[12] 3 Z. R. V. 5, 9-10 (Germany 1933).

[13] 2 OPPENHEIM, *op. cit. supra* note 7, at 535-546; see Article 1 of Hague Convention V, *supra* note 8.

[14] See Article 10 of Hague Convention V, *supra* note 8, which provides: "The fact of a neutral Power resisting, even by force, attempts to violate its neutrality cannot be regarded as a hostile act."

[15] See this writer's *Revision of the Rules of Warfare,* PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 102, 103 (1949).

[16] See *Chronicle of International Events,* 34 AM. J. INT'L L. 130 (1940).

above mentioned violations of neutrality by Germany, H. Lauterpacht wrote in 1940:

> It was not until Germany invaded Denmark and Norway in April and Belgium, Holland and Luxembourg in May 1940, that neutral status as such and the very independence of neutral nations as distinguished from particular neutral rights were ruthlessly violated by a lawless belligerent, and that other neutral states found themselves similarly and increasingly menaced from the same side. Nevertheless, in the first period of what some tended to describe as the second World War, neutrality constituted a prominent feature of the situation. . . .[17]

If the violation of neutrality is not considered justification for war—and the question of the relativity of war or peace is one for the offended neutral to decide in the light of all the circumstances[18]—the neutral state may claim reparations, and if physical injury has resulted, it may also claim damages. An interesting case, illustrative of this point, arose as the result of the accidental bombing by American planes of the Swiss city of Schaffhausen on April 1, 1944. The Secretary of State issued a statement on April 3 in which he stated:

> I desire to express my own and all Americans' deep regret over the tragic bombing by American planes of the Swiss city of Schaffhausen . . .
>
> . . . a group of our bombers, due to a chain of events negating the extensive precautions which had been taken to prevent incidents of this character, mistakenly flew over and bombed Swiss areas located on the north side of the Rhine.
>
> . . . General Spaatz, accompanied by Ambassador Winant, has already called on the Swiss Charge d'Affaires in London and expressed the deep regret of himself and the men in his command at the accidental bombing of Schaffhausen.
>
> Naturally this Government will make appropriate reparations for the damage resulting from this unfortunate event in so far as that is humanly possible.[19]

On April 10 the American Minister to Switzerland, Mr. Leland Harrison, transmitted a check for one million dollars to the Government of Switzerland as the first installment on the payment for damages.[20]

An important corollary of the right to the freedom of neutral territory from belligerent attack is the affirmative duty on the part of the neutral state to prevent violations of its neutrality by one belligerent to the injury of another as well as to protest and demand reparations in case of such violations. An interesting illustration of this corollary duty, and perhaps the leading case in the field, is the case of *The General Armstrong*,[21] settled under the terms of the Convention of February 26, 1851 between Portugal and the United States[22] by the then President of the French Republic, Louis Napoleon. The facts were briefly that Portugal remained neutral

[17] 2 OPPENHEIM, INTERNATIONAL LAW 505 (1940 ed. Lauterpacht).

[18] 7 G. H. HACKWORTH, DIGEST OF INTERNATIONAL LAW 368 (1943).

[19] 10 DEP'T STATE BULL. 314 (1944).

[20] J. M. SPAIGHT, AIR POWER AND WAR RIGHTS 433 (3d ed. 1947).

[21] 2 JOHN BASSETT MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 1094 (1898).

[22] 10 STAT. 911, Treaty Ser. No. 290, 5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 929 (Miller ed. 1937).

in the War of 1812 between the United States and Great Britain. In September 1814, the American privateer, the *General Armstrong*, anchored in the neutral port of Fayal in the Portuguese Azores. A British squadron later entered the same port and "without respect for the rights of sovereignty and of neutrality . . . [of Portugal] a bloody encounter took place between the Americans and the English," leading to the destruction of the American vessel.[23]

Here was a clear violation by both belligerents of the right of Portugal to the inviolability of her territorial waters. The United States later claimed indemnity for the loss of the brig because of an alleged Portuguese failure to grant protection to the *General Armstrong* by a failure to assert Portuguese neutrality. President Napoleon stated in his arbitral award that:

> . . . Captain Reid [the master of the General Armstrong] not having applied, in the beginning, for the intervention of the Neutral Sovereign, and having had recourse to arms for the purpose of repelling an unjust aggression of which he claimed to be the object, thus failed to respect the neutrality of the territory of the foreign sovereign and released that sovereign from the obligation to afford him protection by any other means than that of a pacific intervention. . . .[24]

A somewhat later case involved the capture of the Confederate cruiser, *Florida*, by the *U. S. S. Wachusett* in the port of Bahia, Brazil, in October 1864. The Brazilian Government demanded reparations in the form of a public declaration by the United States that the United States was surprised by the illegal action of the commander of the *Wachusett*, rebuked and condemned it and regretted that it should have occurred; the immediate dismissal of the said commander, followed by the commencement of disciplinary action against him; a salute of 21 guns to be given in the port of the capital of Bahia by one of the United States war vessels; full liberty of the crew and all individuals who were aboard the *Florida* at the time of her capture; and the delivery of the *Florida* to the Government of Brazil.[25]

The Secretary of State acknowledged the responsibility of the United States and agreed to all the Brazilian reparations demands with the exception of the last. The return of the vessel to Brazil had become impossible because of the sinking of the captured vessel at Hampton Roads. The entire reply of the Government of the United States to the Brazilian demand for reparations was based exclusively on the ground that the act of the commander of the *Wachusett* in capturing the *Florida* within the territorial waters of Brazil was "an unauthorized, unlawful and indefensible exercise of the naval force of the United States, within a foreign country, in defiance of its established and duly recognized Government."[26]

These three cases, the *Panay*, *The General Armstrong*, and the *Wachusett*, clearly show the relationship between the neutral right to freedom from belligerent attack

[23] MOORE, *op. cit. supra* note 21, at 1094.
[24] *Id.* at 1095.
[25] 7 JOHN BASSETT MOORE, DIGEST OF INTERNATIONAL LAW 1090-1091 (1906).
[26] *Id.* at 1091.

and the neutral duty to protect this freedom with all the means at its disposal. The *Schaffhausen* case explains the belligerent duty not to attack neutral territory and the belligerent obligation to make reparations and pay damages for injuries resulting from such an attack. All of the cited cases above pertain to violations of the law of neutrality and must not be confused with violations of the laws of war. A violation of neutrality is a breach of a duty and is an international tort,[27] while a violation of the law of war is an international crime.[28]

The right to the freedom of neutral territory from belligerent attack does not extend to the real or personal property of a neutral state or individual in the zone of active military operations.[29] In this type of case it is generally held that mere destruction of neutral property incidental to operations of war does not demand compensation or damages.[30] Of course there is no question of reparations in such cases. The only question is whether international law imposes any duty upon a belligerent to give special protection to neutral property and the answer is that it does not. In answering a similar question arising out of the military occupation of Germany, the legal adviser of OMGUS stated:

> It is a well settled rule of international law that no difference is to be made by belligerents between the treatment to be accorded to subjects of the enemy and to subjects of neutral states inhabiting the enemy country. The latter must share the fate of the population living in enemy territory; they are deemed to have acquired enemy character by being domiciled (i.e., resident) in enemy country and having thereby identified themselves with the enemy population. For this reason all measures which may legitimately be taken against the civil population of the enemy territory—including requisitions, contributions and punishments for hostile actions committed against the occcupant—may also be taken against them. . . . Such resident subjects of neutral states have no better right than subjects of the enemy against the occupant for compensation for losses sustained in consequence of legitimate acts of war on the occupant's part.
>
> It may be concluded, therefore, that international law imposes no duty upon an occupying power to give special protection to property located in an occupied area and owned by nationals of neutral nations resident therein. Such a duty, owing in particular cases, may, of course, be created by treaties or other international undertakings.[31]

The principle stated in the opinion of the legal adviser of OMGUS had been applied earlier in a case involving the arrest of a neutral person in occupied territory. The facts were that the claimant before the Greco-German Mixed Arbitral Tribunal had been arrested in Rumania during the German occupation in World War I on suspicion of concealing arms. He was detained for eight days and then released. Germany denied liability on the ground that the arrest could not be considered as falling within the meaning of the term *"actes comises"* of section 4, Annex to Articles 297-298 of the Treaty of Versailles. The Arbitral Tribunal held that the German

[27] See note 7 *supra*.
[28] See the Charter, Opinion, and Judgment of the International Military Tribunal at Nuremberg.
[29] See SCHWARZENBERGER, *op. cit. supra* note 7, at 296-300.
[30] See 2 OPPENHEIM, *op. cit. supra* note 7, at 520.
[31] 12 SELECTED OPINIONS OMGUS 72-73 (Apr. 1, 1948-Aug. 15, 1948).

State was not responsible, because the occupying authorities were entitled to arrest any inhabitants of occupied territory, including neutral inhabitants thereof, suspected of concealing arms. The arrest was not *per se* an illegal act. The tribunal stated that in principle a neutral person wrongfully arrested would be entitled to compensation by reason of injury suffered in consequence of detention and that non-payment of such compensation would constitute an unlawful act under Section 4, Annex to Articles 297-298 of the Treaty of Versailles. However, eight days was not considered sufficient to constitute an unlawful arrest and the claimant was not considered likely to have been damaged in such a short period.[32]

It is almost generally held that the requisition of neutral property is legal provided full compensation is given.[33] This is a right of a belligerent and is known as the *ius angariae*. The right of the freedom of neutral territory from belligerent attack has no applicability in cases arising under the *ius angariae*, or right of angary, which is a right of belligerents, in case of urgent necessity to detain, use or even destroy neutral property found within the territory of or occupied by the belligerent. The payment of compensation to the neutral is a necessary condition of such use.[34] The application of this rule has usually arisen through the detention, use or destruction of neutral vessels temporarily in the ports of a belligerent, and the usual question arising therefrom is what is just compensation or indemnity to the neutral for the use of his property. In the *Norwegian Claims* case, which was tried before the Permanent Court of Arbitration at the Hague in 1922, the United States and Norway were the parties. There was a wide divergence of opinion between the parties as to the amount of indemnity due from the United States to Norway for Norwegian ships in the process of construction in the United States and requisitioned by the United States under the authority of an act of Congress which provided that just compensation must be paid. The Tribunal stated that:

> Just compensation implies a complete restitution of the *status quo ante*, based, not upon future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners as compared with other owners of similar property.[35]

The right to the freedom of neutral territory from attack does not extend to the two cases just discussed, but in World War I the question of aircraft in relation to the right of the inviolability of neutral territory first became of practical importance. The question arose as to the jurisdiction of a subjacent country over its air space. Because of their geographical situations, Switzerland and Holland faced many problems concerning this question.[36] Each country claimed that its jurisdiction over its

[32] ANNUAL DIGEST OF PUBLIC INTERNATIONAL LAW CASES 1928-30 509 (Lauterpacht ed., 1935).

[33] SCHWARZENBERGER, *op. cit. supra* note 7, at 298.

[34] See Graham, *Neutrality and the World War*, 17 AM. J. INT'L L. 704, 715 (1923); see also U. S. NAVAL WAR COLLEGE, INTERNATIONAL LAW DISCUSSIONS 104 (1903), wherein is set forth the United States rule. See also *Draft Convention on Neutrality in Naval and Aerial Warfare*, 33 AM. J. INT'L L. 359-385 (Supp. 1939).

[35] 2 SCOTT, *op. cit. supra* note 10, at 73.

[36] See SPAIGHT, *op. cit. supra* note 20, at 420-460.

territory extended *jusque ad coelum* and therefore asserted the right to use necessary force to prevent the entrance of belligerent aircraft into neutral skies.[37] Thus when belligerent aircraft passed over neutral territory without intending to land, they were fired at for the purpose of compelling them to do so.[38] The belligerents, on the other hand, claimed the use of the skies over neutral territory and justified such use on the ground of military necessity.

It is proper, at this point, to discuss the defense of military necessity in relation to belligerent violations of neutral rights. The argument has been advanced that violations of neutral rights are justified on the grounds of military necessity and on the ground that the laws of neutrality are so inadequately defined as to be of little value in controlling belligerent actions.

It is important to determine here just what is military necessity and what are the international legal limitations on military necessity. In *Field Manual 27-10, Rules of Land Warfare*, it is stated that one of three basic principles of warfare is:

> *The principle of military necessity*, under which, subject to the principles of humanity and chivalry, a belligerent is justified in applying any amount and any kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life, and money. . . .[39]

Georg Schwarzenberger, the lecturer in international law at the University College, London, wrote that:

> Military necessity . . . merely determines the farthest limits to which considerations of military expediency may extend. Restrictions imposed by customary and conventional rules may more closely narrow the "reason of war" which is but the application to warfare of the principle that the end justifies the means most conducive to attaining it.[40]

Another famous publicist has recently stated that:

> . . . In our days . . . warfare is no longer regulated by usages only, but to a greater extent by laws—firm rules recognized either by international treaties or by general custom. These conventional and customary rules cannot be overruled by necessity. . . .[41]

Another writer has recently written that:

> The important question whether the laws of neutrality allow belligerent military aircraft to come and go in neutral jurisdiction was answered by the practice of 1914-1918 with a firm and unmistakable negative. The unanimity of the answer was remarkable. . . .[42]

Holland, Denmark, Sweden, Norway, Switzerland, Italy, Spain, Bulgaria, China, and Rumania, showed while they were all still neutral that they accepted the principle of prohibiting the entrance of belligerent aircraft into neutral skies and acknowledged the obligation to intern any belligerent aircraft violating this principle.

[37] U. S. NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS 100-101 (1926).
[38] 2 OPPENHEIM, *op. cit. supra* note 7, at 586.
[39] F.M. 27-10, RULES OF LAND WARFARE 1 (1940).
[40] SCHWARZENBERGER, *op. cit. supra* note 7, at 262.
[41] 2 OPPENHEIM, *op. cit. supra* note 7, at 185.
[42] SPAIGHT, *op. cit. supra* note 20, at 420.

The practice of 1914-1918 "created a rule of international law which must be regarded as being as firmly established as it is possible for such a rule to be."[43]

In commenting upon this customary rule of international law, which is certainly a limitation upon military necessity, H. Lauterpacht remarked that:

> The almost invariable practice of neutral states during the World War, coupled with the general acquiescence of belligerents, may be said to have established two customary rules: firstly, that belligerent aircraft must not enter the air space over neutral territory in time of war; and secondly, that if they do, either intentionally or inadvertently, and are compelled to land, the neutral State must intern them.[44]

Customary international law became conventional international law through Article 14 of the Habana Convention on Maritime Neutrality which provides that the aircraft of belligerents shall not fly above the territory or territorial waters of neutrals, if it is not in conformity with the regulations of the latter.[45]

Writing in 1939, Green Hackworth, then the legal adviser of the Department of State and now a Judge on the International Court of Justice, stated that:

> It can now be said to be international law that belligerent war planes have no right to fly into or through neutral jurisdiction. The subjacent neutral state has complete jurisdiction over the air, and the practice of neutrals in the last war and the provisions of codes and conventions since that time established the fact that the military planes of belligerents are barred from flight in neutral air.[46]

From the above authorities it would appear that the general rule of military necessity cannot apply where there are customary or conventional rules of international law restricting military necessity. It would further appear that the violation of neutral air space cannot be justified on the ground of military necessity as such violation is specifically prohibited by customary and conventional international law.

2. *The right to the freedom of neutral territory from belligerent use.* This is the second of the fundamental rules of neutral rights. It is the right of a neutral not to have its territory used by one belligerent as a base of military operations, of recruiting, or of communication, against another belligerent. It imposes a duty on the neutral to use all the means at its disposal to prevent such use of its territory by or on behalf of one of the belligerents.[47] It also imposes the duty on belligerents not to use neutral territory as a base of military, naval or air operations against other belligerents.[48]

[43] *Ibid.*

[44] 2 OPPENHEIM, *op. cit. supra* note 7, at 586.

[45] 47 STAT. 1989, Treaty Ser. No. 845, 4 MALLOY'S TREATISES 4743 (1910).

[46] 7 HACKWORTH, *op. cit. supra* note 18, at 555, *citing* U. S. NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS 85 (1929).

[47] U. S. NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS 87-88 (1939).

[48] The Resolution of the Meeting of the Foreign Ministers of the American Republics stated that the American Republics "(a) Shall prevent their respective terrestrial, maritime, and aerial territories from being utilized as bases of belligerent operations." REPORT OF THE DELEGATES 54 (DEP'T STATE CONF. SER. 44, 1940).

The first question to be considered here is what constitutes a base of operations. In maritime warfare such a base of operations appears to be established when neutral territory affords increased strength to some unit of naval force, such as a single warship or a flotilla of warships, which is thus enabled to engage in hostilities without returning to its home port.[49] In land warfare it is generally understood that a base of operations means a location which in active military operations serves as a point of departure and return, to which lines of communication are maintained, and to which the armed forces can fall back whenever there may be need for shelter, supplies, or a renewal of the operation.[50] In aerial warfare a base of operations would, in the opinion of this writer, be any airfield or air installations located in neutral territory from which air attacks could be launched by one belligerent against another and to which belligerent aircraft could return for refueling or reequipping.[51]

This writer has been unable in the sources available to him to find a single case in which a neutral state has claimed damages for violation of the right to the freedom of neutral territory from belligerent use. Although it may be said that the United States was attempting to uphold this right in the *Genet* controversy, the record reveals that the solution was not a demand for damages but the undeclared war with France. On the other hand, there are numerous cases where belligerents have claimed damages against neutrals for failure of the neutral to protect the right. The most notable of these cases is the *Alabama Claims* case, settled under the terms of the Treaty of Washington of 1871 between the United States and Great Britain. The arbitration tribunal awarded the United States the sum of $15,500,000.00 "as the indemnity to be paid by Great Britain to the United States, for the satisfaction of all the claims" resulting from the violations of British neutrality by the Confederate States which injured the United States.[52] The award was based on the three rules which provide that a neutral government is bound:

> First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.
>
> Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.
>
> Thirdly. To exercise due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.[53]

[49] 1 C. C. HYDE, INTERNATIONAL LAW 716 (2d ed. 1947).

[50] See Sir Alexander Cockburn's opinion in 4 MOORE, INTERNATIONAL ARBITRATIONS 4100 (1898).

[51] See Article 16, Draft Convention on Neutrality in Naval and Aerial Warfare, 33 AM. J. INT'L L. 337 (Supp. 1939).

[52] 4 PAPERS RELATING TO THE TREATY OF WASHINGTON 49, cited in J. B. SCOTT AND W. H. JAEGER, CASES ON INTERNATIONAL LAW 897, 903 (1937); 1 MALLOY'S TREATIES 716, 722 (1910).

[53] 1 MALLOY'S TREATIES 700, 703 (1910).

While these three rules caused much discussion at the time of their promulgation, they are admitted at the present time to state the duties of neutral nations in time of war and they have been incorporated in substance into Articles 5 and 8 of the Hague Convention XIII concerning the rights and duties of neutral powers in naval war.[54]

Due to the continuance of the legal state of war between the allied powers and Germany and Japan, no cases have yet been adjudicated by international tribunals on claims for violations of neutral rights arising out of World War II. It is the understanding of this writer that the Italian-American Conciliation Commission established under the terms of the Italian peace treaty[55] is presently meeting in Rome, but as far as is known at the present time no awards have been announced.

In conclusion this writer hopes that by considering the questions here discussed he may have aided in a small measure those persons who may have to present such claims to international tribunals in the future, and that such international tribunals, having behind them the great body of the international law of neutrality laid down by their predecessors, may follow in their legal footsteps. When all is said, the fact remains that "the decisions of International Courts and Tribunals constitute evidence of international law of a very much more persuasive and authoritative character than any other available in this sphere."[56]

[54] See the cited articles. See also the note in SCOTT AND JAEGER, *op. cit. supra* note 52, at 903.
[55] See Article 83 of the Treaty of Peace with Italy, Dep't State Pub. No. 2743, p. 41.
[56] See SCHWARZENBERGER, *op. cit. supra* note 7, Preface v.

WAR DAMAGE AND NATIONALIZATION IN EASTERN EUROPE

SAMUEL HERMAN*

I

In assessing the consequences of modern war the economic history of Eastern Europe in the post World War II period is extremely significant. Five years after the end of World War II, it is Eastern Europe which has experienced the swiftest evolution in economic form. In varying degrees, Poland, Czechoslovakia, Yugoslavia, Rumania, Hungary, and Bulgaria have shifted from capitalistic to communistic economies. Behind this transformation was the impetus of World War II. The Russian revolution, itself, it should not be forgotten, occurred in the late stages of World War I. No symposium dealing with modern problems of war claims would seem complete without some discussion of modern war damage in its most generalized sense, *i.e.*, the loosening and weakening of the basic economic structure of modern societies under the pounding of military and economic warfare and the revisionist policies of enemy occupations. The lesson of Eastern Europe is that economic reform is tremendously accelerated, nationalization ensues, and, given political pressures generating from within a destroyed or injured economy, and simultaneously asserted from without, the form of the society is transformed.

Thus neither the legal, economic, nor political aspects of war damage to property can, in our time, be fully isolated or considered in a vacuum. Compensation for damage is, of course, the touchstone of the legal approach. War damage may have occurred on such a scale that compensation in the conventional sense cannot be practically entertained. Compensation, as an economic device for restoring economies, may be rejected by governments in the face of overwhelming compulsions to adopt alternative solutions. In the circumstances of World War II, given the magnitude of the injuries and wrongs to private individuals, the thoroughgoing overhauling of property rights perpetrated by the Nazi occupants of Eastern Europe,[1] and the uniform policies adopted in the liberation and reconstruction period of 1945-1947, "war damage" moves away from "war claims" and merges with the fundamental political considerations of the economics of reconstruction. It cannot be divorced from the post-war reorientation of views concerning property rights and relations. Thus Poland and Czechoslovakia, facing similar problems of post-war reconstruction, quickly recognized the oneness of property rights, political

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[1] See RAPHAEL LEMKIN, AXIS RULE IN OCCUPIED EUROPE 36-49 (1944). "Social philosophers and statesmen must watch carefully the phenomenon of the destruction of the institution of private property in Europe in the present war, which may become even more extensive if the war is prolonged and may prove significant for future developments in the post-war period." *Id.* at 40.

orientation, and economic planning. In the large they were considered aspects of one problem. This was true of the countries of Eastern Europe whether or not they were "enemy" or "allied" during World War II. Although faced by certain legal consequences of their participation in World War II, Rumania, Hungary, and Bulgaria, as enemy states, were faced with the same problem, and, it is worthy of note, progressed to the same basic communistic forms as Poland, Czechoslovakia, and Yugoslavia, allied states in the same war.

In this very broad context of war damage—namely, the destruction of property rights as well as physical property by the Nazis—more important, at the outset, than the physical reconstruction of war damaged properties was the governmental need[2] to disentangle property rights, undo forced transfers of property compelled by the Nazi occupiers, and reestablish some semblance of property relationship more consistent with the political viewpoints of the liberated governments. The fact that the titles of many properties could not be restored because the former owners or their heirs were dead or missing faced the returning governments immediately. The fact that collaborators had succeeded, through Nazi intervention, to large holdings of properties also faced the liberated governments who could not, for obvious reasons, permit such holdings to be maintained. A vast aggregation of property rights in Nazi persons or governmental instrumentalities—a form of looting—necessitated divesting and redistribution of the property in the interests of the new governments. The forced evacuation of important areas in Czechoslovakia through the expulsion of the Sudeten Germans[3] presented to the Czechoslovak government, headed by Dr. Benes, the problem of redistribution or state ownership of land and faced it with difficult questions as to whether and how new property rights were to be established. Similarly, in Poland, the administration of large areas of Eastern Germany conferred upon the new Poland through the Potsdam and Yalta agreements[4] presented to the early democratic Polish government the problem of how and under what circumstances to redistribute the land and the properties of this wealthy area, or to set up state ownership and control, after forcing the evacuation of the German inhabitants. New territorial accretions to Yugoslavia[5] involved similar considerations of population and property.

In situations such as these, evolving from World War II, and, in the context of this discussion, best considered as in the nature of reparation on a governmental level

[2] Compare INTER-ALLIED DECLARATION AGAINST ACTS OF DISPOSSESSION COMMITTED IN TERRITORIES UNDER ENEMY OCCUPATION AND CONTROL, MISCELLANEOUS NO. 1 (London, 1943).

[3] See Chapter XII, *Protocol of the Proceedings*, Aug. 1, 1945, The Berlin (Potsdam) Conference, as contained in A DECADE OF AMERICAN FOREIGN POLICY, 1941-49, SEN. DOC. NO. 123, 81st Cong., 1st Sess. (1949). "The Three Governments, having considered the question in all of its aspects, recognize that the transfer to Germany of German populations, or elements, thereof, remaining in Poland, Czechoslovakia and Hungary, will have to be undertaken." *Id.* at 45.

[4] *Id.* at 43-44. For *Protocol of Proceedings*, The Crimean (Yalta) Conference, Feb. 4-11, 1945, see *id.* at 31. About 40,000 square miles of Eastern Germany territory was placed under the administration of the Polish state; five to six million Germans were evacuated.

[5] See Section IV, Treaty of Peace with Italy, 1947 (Dep't State Pub. 2743, European Series 21).

for war damages, the new governments faced the necessity of intervening with respect to the property rights of individuals in the paramount interests of public order, security, and restoration of occupation economies on a new basis. Uniformly, both as to new territories and as to former territories under Nazi or puppet occupation, liberated governments, of necessity, assumed the initial role of Administrator or sequestrator of property rights, as the case might be. Presumably, this was a form of trust in which the eventual form of the property rights could follow the course of either economic necessity or political pressure. In fact it followed the course of both. The firm pre-war relationships of property titles and rights had been drastically modified by the Nazi occupants to an unparalleled degree in the history of modern war. The end of the occupations and the withdrawal or evacuation of the Nazis and their collaborators from the territories and properties which they had seized or held, immediately loosened the entire structure of property rights in the territories of the Eastern European countries. The state intervened of economic necessity and perpetuated the process for political reasons. It is the purpose of this discussion to trace this development in some of its more important forms in the legislation of three of the Eastern European states—Poland, Czechoslovakia, and Yugoslavia.

The beginning of the process was liberation and the end of the Nazi-Fascist domination; the end was the total nationalization of the economies of the liberated countries. It is fair to state that in terms of the economic consequences of war this is the most significant of all of the results of that struggle. While the omnipresent Soviet power in Eastern Europe facilitated the eventual establishment of communist governments in the Eastern European countries,[6] it is, of course, notable that the restored governments, with the exception of Yugoslavia, were not at the outset wholly communist. There was in the beginning, in 1945, the pervasive spirit of the Potsdam Agreement. Yet the economic need for intervention by the state in property rights faced the early governments and forced its accomplishment. Agrarian reform as a policy of government had existed in varying degrees of implementation in all of the Eastern European countries prior to World War II. Distribution of the land, while slow and frequently ineffectual, had nevertheless been commenced after World War I.[7] This slow pre-war agrarian reform received enormous impetus in Poland and Czechoslovakia under the early post-war political coloration of these then democratically orientated countries. If the law of a state is determined by its economics, it is significant that without exception the laws of the liberated democratic governments provided, directly or indirectly, for large measures of state intervention, ownership, and control.[8] It is suggested that the Soviet Government, as-

[6] Dates of Communist ascendancy to power are as follows: Rumania, March 6, 1945; Yugoslavia, January 30, 1946; Bulgaria, July-November, 1946; Poland, February 6, 1947; Hungary, June 1, 1947; Czechoslovakia, February 25, 1949.

[7] Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COL. L. REV. 1125, 1126 (1948).

[8] See as to Poland, Czechoslovakia, and Yugoslavia, Sections II-IV, *infra*.

suming its desire to see communist governments in Eastern Europe, could not have failed to recognize that the inevitable consequence of the economic pressure for state intervention in countries that had been looted, corrupted, damaged, or destroyed by the Wehrmacht and the Nazi occupations and collaborators would be (were Soviet political and military pressure asserted at the proper times) the conversion of private enterprise and capitalistic forms, in the Eastern European states, to the economic *sine qua non* of a communist society—the total nationalization of the basic productive property of the state and the severe curtailment of virtually all property rights as they are known in Western states. It is permissible to wonder whether, to some degree, the early post-war experience of the Eastern European states did not remind the Soviets of Kerensky's brief experience, after World War hostilities ended in Russia, and prior to the Soviet seizure of power.

Total nationalization as it finally materialized in the Eastern European countries after World War II showed in its very form and nature the nexus with what, in its most generalized form, has been referred to in this discussion as "war damage." A generalized analysis of the basic principles and similarities of the eventual nationalization measures in Eastern Europe is made later herein.[9] To the extent that Eastern European nationalizations differ from their best known historical predecessor, the Soviet nationalizations after the October Revolution of 1917, they reflect the differences between World War I and World War II. Thirty years of Russian experience with both the political and economic consequences of total nationalization had intervened. It has been noted that agrarian reform had made measures of progress in Eastern non-communist countries in those thirty years. Measures of socialization and economic reform which, in all instances, fell short of total nationalization had occurred in Western European countries and in the United States in the 1930's as a consequence of the Great Depression. Socialization of some sectors of the economy had occurred in both the Nazi and Fascist regimes of the 1930's. But an important historical difference between the nationalization movements in the Eastern European countries and the Soviet nationalizations after World War I was the degree of acceptance by the Western states of post-World War II nationalizations. It is, of course, true that after the onset of the so-called "cold war," political resistance developed in the United States and elsewhere to the extension of nationalization in the Eastern European countries under the later communist regimes. A great difference, however, was that the post-World War II nationalization process was, at the outset, not considered as revolutionary but recognized, even by the friends of private enterprise, as probably economically necessary and politically unobjectionable. Thus, as will be seen, many measures in Czechoslovakia, later extended and accelerated by the communists, were launched, with full acceptance by the Western powers, under the early Benes regime.[10] Nationalization was gradualistic, stemming

[9] Nationalization is treated in this article largely in terms of the relationship of "compensation" and "capacity to pay."

[10] See Section III, *infra*.

step by step from pre-World War II beginnings, to war damage, enemy occupation, and post-war reconstruction. In this gradual process would the role of the state be, at some point, inhibited, restrained, or reversed in favor of private enterprise? This was one of the deeply perplexing questions which were asked in the early discussions which led eventually to the formulation and adoption of the Marshall Plan. It was recognized, in the pre-Marshall Plan period, that under the influence of Soviet power and pressure, and without outside economic aid, most of the European countries might be forced to carry through to total nationalization. It developed that the course which each country would take after the terrible cost of World War II, would, in large measure, be determined by whether or not the country joined the Marshall Plan program. The Eastern European countries did not. Their path led from the damage of the war to total nationalization, and thus the course of their economies became interwoven with political decision. In this view of the matter, what to do about "war damage" was governed by political as well as economic decisions. But the legal theory was also of great importance.

Law mixes with politics and economics in the formulation of basic problems after military destruction in modern war. Lawyers representing the interests of property holders consider war damage to be a compensable wrong committed against the property holder. Legal thinking, in such a context, is immediately concerned with the problem of compensation for property loss which, when the war damage is sufficiently extensive, becomes, for an economy, a mixed problem of law and economics. This is also true of property loss suffered by virtue of nationalization or takings by the state. Some consideration of the manner in which the Eastern European countries looked and look upon the problem of compensation is thus highly relevant.

Soviet legal doctrine after World War I, although somewhat modified by the concessions to private enterprise made by Lenin, did not recognize that there was an obligation to pay compensation for the value of property expropriated or nationalized by the Soviet government.[11] Internally, compensation was afforded by the Soviets to Soviet nationals in terms of social welfare rather than of legal obligation.[12] Nor is it clear, after thirty-three years, that the Soviets have at any time recognized that there is an obligation under international law to pay just, adequate, and effective compensation for the property of foreign nationals expropriated by the Soviet government.[13] This failure clearly to recognize an obligation to compensate lay at the threshold of the non-recognition by the United States of the Soviet government in the period 1917-1933. But after World War II there was no question of non-recognition by the United States of the Eastern European governments on the score

[11] See Hazard, *Soviet Property Law*, 30 CORNELL L. Q. 466 (1945), for discussion of the Soviet theory.

[12] Compensation has been afforded as to property which Soviet law permits to remain in private ownership but subject to state controls.

[13] See note 18, *infra*.

of their nationalization programs. This recognition continues today[14] under the total nationalization programs of the communist regimes in those countries. While the Soviets at various times discussed, on inter-governmental levels, the nationalization claims of foreign nationals, so far as is known no settlement agreements of this nature as between governments were ever reached. An agreement to settle such claims, reached in the exchange of notes in the 1933 recognition of the Soviet government by the United States, resulted in negotiations which reached an *impasse* in 1935, and were never resumed.[15] Anglo-American legal thought could not, nor cannot, comprehend the Soviet position that an act of confiscation or nationalization without compensation was the restoration to the people of property stolen from them by their exploiters and not the stealing of property by the state from the people.

Failure to compensate foreign nationals affords diplomatic justification for challenging the action of nationalization.[16] In the Soviet view, compensation to foreign nationals, if to be made at all, is in the interests of international economic relations rather than in discharge of an obligation by the Soviet government under international law.[17] On this Soviet premise, compensation, if made at the inter-governmental level, could only be in terms of economic *quid pro quos* between the governments involved. In return for voluntary payment of compensation, the Soviets expected economic concessions.[18] In brief, the Soviets would pay if it proved to their immediate economic advantage to pay.

The problem of compensation developed almost immediately in the nationalization programs of the Eastern European countries after World War II. Oddly enough for theory, the ultimate position of the Eastern European countries and of the Soviet government after World War I proved identical. Compensation would be paid as between governments provided economic concessions were given by the government of the country whose nationals' property had been taken. The justification, however, for this was not as the Soviets had put it, that there was no legal obligation to pay. Eastern European countries recognized the legal obligation to

[14] Diplomatic relations between the United States and Bulgaria were severed on February 20, 1950.

[15] See ESTABLISHMENT OF DIPLOMATIC RELATIONS WITH THE UNION OF SOVIET SOCIALIST REPUBLICS, 1933 (Dep't State, Eastern European Series, No. 1). Under the so-called "Litvinoff Assignment" of November 16, 1933, certain claims of the Soviet Government as successor to prior Governments of Russia against American nationals were assigned to the United States "preparatory to a final settlement" of claims and counterclaims between the two governments. There has been no "final settlement." Some $7,000,000 has been collected by the United States pursuant to the "Litvinoff Assignment."

[16] For a recent review of the authorities, see Rubin, *Nationalization and Compensation: A Comparative Approach*, 17 U. OF CHI. L. REV. 458 (1950).

[17] On this the diplomatic documents published in 2 FOREIGN RELATIONS OF THE UNITED STATES: 1933 at 778-840 (Dep't State, 1949), are illuminating.

[18] As *quid pro quo* for the settlement of claims of the United States, the Soviets expected credits or loans. The Soviets hoped to achieve two purposes: (1) propagandistic: to make payments in an indirect or disguised manner which would permit the Soviet Union to deny that it was recognizing the validity of the nationalization claims of foreign nationals; and (2) economic: to obtain concessions and terms from the United States which it would be impossible for other claimant governments to extend to the Soviets thereby relieving the Soviets of the necessity of extending comity in claims settlements to all foreign governments. See note 17, *supra*.

pay[19] but justified the failure to pay compensation on the score of lack of capacity to pay.[20] This lack of capacity to pay obviously stems from the premise of extensive war damage in World War II and the generally recognized necessity of restoring war damaged economies, given a condition of inadequate or partial war reparations only. This recognition of the legal obligation to compensate, both as to the nationalizing country's own nationals and as to nationals of foreign countries, is an interesting aspect of the gradualism after World War II. Local compensation remedies are provided for, without exception, in the nationalization legislation of the Eastern European countries. It is doubtful whether these countries at any time realistically expected that the nationals of foreign countries would take advantage, to any great extent, of local remedies providing for compensation. In fact, the governments of Western nationals investing in Eastern European countries, have not recognized that such remedies, and the relief afforded, satisfy the standards of justice under international law. Compensation has thus far been made in a framework of overall settlements between governments.[21] The fact that such settlements have been made after World War II and could not be made with the Soviet Union after World War I is some indication of the changing international viewpoint caused by economic developments between the two wars and by the nature of World War II itself. It is significant, in evaluating the consequences of modern war, to note that not only have Western countries, in the midst of the "cold war," settled nationalization claims on mutually advantageous terms with Eastern European countries, but that they have recognized the right of the Eastern European countries to nationalize and gauge their obligations in terms of their capacity to pay. This acknowledgment that the legal obligations of the Eastern European countries are to be tested fundamentally by capacity to pay is, it is suggested, an outgrowth of the entire problem of reconstruction and reparation after World War II.

It is doubtful whether capacity to pay would have become a key concept were it not for the destruction caused by World War II. Capacity to pay, between states, is a matter of meeting the recognized obligation to pay just, adequate, and effective compensation.

Local remedies available under the legislation of the Eastern European countries

[19] Thus as to Czechoslovakia, Paragraph 7 of Agreement on Commercial Policy Between the United States of America and Czechoslovakia (Treaty Ser. 1569) effective November 14, 1946, provides: "The Government of the United States and the Government of Czechoslovakia will make adequate and effective compensation to nationals of one country with respect to their rights or interests in properties which have been nationalized or requisitioned by the Government of the other country."

As to Poland, see DEP'T STATE PRESS RELEASE No. 935 (Dec. 27, 1946).

[20] This position was always taken, as will be seen, when foreign governments insisted on compensation other than in local currency.

[21] Examples: Belgian-Czechoslovak, November, 1949 (settlement fund accumulated by deducting percentage of payment for imports from Czechoslovakia); British-Czechoslovak, September, 1949 (installment compensation with simultaneous trade agreement); British-Yugoslav, December 23, 1948 (simultaneous trade agreement with schedules of imports and exports); United States-Yugoslav, July 19, 1948 (simultaneous unblocking of Yugoslav assets in the United States); French-Czechoslovak, August 6, 1948 (payment out of credit balance in favor of Czechoslovakia arising out of economic and financial relations between the two countries).

provide for payment in local currency or payment in long-term bonds redeemable in local currency.[22] One of the consequences of World War II was the extension of foreign exchange controls to almost all countries.[23] Local currencies were universally blocked in the nationalizing countries. Foreign governments in espousing the claims of their nationals arising out of the nationalization of property interests contended that payment in local blocked currency did not constitute "effective" compensation, since a totally nationalized economy did not permit of private reinvestment in the country and, accordingly, local currency was of no practical utility to a foreign national, thereby making such "compensation" a nullity. The right of a government to control its currency has been internationally recognized[24] and has been a prime reason for diplomatic espousal of nationalization claims and a stimulus to inter-governmental overall settlement. Inevitably, inter-governmental negotiators must consider the question of the capacity to pay by the nationalizing country, since the availability or non-availability of foreign exchange determines the possibility of "effective" compensation. The right to block currencies is explicitly recognized by the international community and the privilege of a country, whose economic condition does not so warrant, to make payments in foreign exchange is even curtailed by international agreement.[25]

The Eastern European countries have contended that the test of any obligation under international law must be realistic; that no country should be expected to meet an obligation which it is economically impossible for it to assume. The counter argument has been that no state has an international right to take property without providing prompt, adequate, and effective compensation and, given the absence of such compensation, the taking is a nullity.[26] The nationalizing countries have claimed that the right of a state to expropriate property is an attribute of its sovereignty. The right of a state to block local currencies and otherwise engage in financial controls is, it has been contended, also an attribute of sovereignty. The simultaneous exercise of both powers nullifies neither. The requirement of "just, adequate, and effective compensation" originated in a time of widespread private property holdings and relatively limited property takings by the state. Such takings, commanding "prompt, adequate, and effective" compensation, were for police or public welfare purposes—such as expropriation of property for highways, schools, and the like. In such a period in the international community, the state was a minor factor in property holdings and the private individual the major factor. Accordingly, in the view of the Eastern European countries, the obligation to make "prompt, adequate, and effective" compensation was always correlative to a country's

[23] See Sections II-IV, *infra*.

[23] See FIRST ANNUAL REPORT ON EXCHANGE RESTRICTIONS, INTERNATIONAL MONETARY FUND (March 1, 1950).

[24] *Cf.* Rubin, *supra* note 16, at 460-462.

[25] See Article 8, Section 2, ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND 28-67 (Dep't State Pub. No. 2187, Conf. Series 55, 1944).

[26] Hyde, *Compensation for Expropriation*, 33 AM. J. INT'L L. 108, 112 (1939).

capacity to pay or its capacity to raise the means of compensation by taxation or negotiable credit instruments.[27] This, the Eastern European countries claimed, they could not do on the basis of the established doctrine of compensation because of the economic destruction and chaos caused by World War II and the "acceleration of history" thereafter. Can any modern state, particularly a state badly damaged by modern war, be required to pay prompt, adequate, and effective compensation to all former property holders where, in the exercise of its public policy, it nationalizes the entire economy? Did not the economic consequences of World War II make nationalization a reasonable exercise of public policy? Assuming such a state, in the exercise of its soverign power, establishes a basis of local currency payments adequate to meet, over a long period of time, compensation obligations, is it obligated to pay promptly in unblocked foreign exchange to foreign nationals? If the nationalizing state has no capacity to make such payment, especially where large scale foreign investment has existed on a pre-war basis and has been nationalized on a post-war basis, is a foreign government warranted in insisting on such compensation without entering into correlative and simultaneous economic agreements whereby through loans, credits, or agreed trade turnover it is made possible for the nationalizing state to pay compensation in settlement? In brief, allied countries during World War II such as Czechoslovakia and Poland have taken the position that the international obligation to pay can be implemented only if the government insisting on the obligation makes it possible for the nationalizing government to pay. Could the United States, if it nationalized its entire economy, pay "prompt, adequate, and effective compensation" to all holders of private property in the United States? An insistence upon the letter of the obligation in effect negated the international recognition of sovereign right to expropriate property. All inter-governmental settlements for the nationalizing of property after World War II, where the East and West are involved, have been entered into on simultaneous conditions of economic aid or specified trade relations between the compensating and the compensated countries.[28] In thus posing the question of who "compensates" whom, the Eastern European countries after World War II had, in practical effect, come very close to the Soviet position after World War I. The outstanding difference between World War I and World War II in this respect has been the recognition, by important countries of the West, of the practical logic of this position taken by Eastern European countries.

Given the foregoing, the fact that lump-sum inter-governmental settlements

[27] *Cf.* 1 L. F. L. OPPENHEIM, INTERNATIONAL LAW 318 (6th ed., Lauterpacht, 1947). "The rule is clearly established that a State is bound to respect the property of aliens. This rule is qualified, but not abolished, by two factors: . . . The second modification must be recognized in cases in which fundamental changes in the political system and economic structure of the State or far-reaching social reforms entail interference, on a large scale, with private property. In such cases neither the principle of absolute respect for alien private property nor rigid equality with the dispossessed nationals offer a satisfactory solution of the difficulty. It is probable that, consistently with legal principle, such solution must be sought in the granting of partial compensation."

[28] See note 21, *supra*.

have been made by Eastern European countries is not surprising when to the factor of concomitant economic concession there is added the factor of the property damage of World War II. A lump-sum settlement is a negotiated settlement and does not mean the payment of 100 per cent of the claims asserted or of their probable worth. And apart from the obligation to pay and the capacity to pay, there are important questions as to the values of the properties involved. A feature of war damage in World War II is that the total extent of the later nationalization obligation is minimized by reduction in valuations because of damage. Also, certain other simultaneous large scale penal confiscations by the nationalizing country are, under recognized principles of law, not subject to compensation. In Eastern European economic planning, if the amount of compensation payable for all properties taken is greatly reduced because there is no obligation for penal confiscation, it may be feasible to nationalize an entire economy. This is part of the pattern, it may be observed, adopted by the Soviets in the post-Revolution takings of property in the Soviet Union. The legal distinction between confiscation and nationalization has important economic consequences in assessing the burden of compensation that the state assumes to pay. To the extent that the state is free from the legal obligation to pay compensation, and from the moral and propaganda onus in failing to discharge its obligation, it is in a stronger position to operate a nationalized economy totally "owned" by the state. The Eastern European countries, it is submitted, found it possible to carry on nationalization programs, although assuming a burden of compensation, because in addition to the facts that World War II had made it cheaper to nationalize, and economic concessions and bargained reductions in cost could be obtained in the post-war period, they had, through penal measures, confiscated substantial amounts of property without an obligation to compensate.

In all of the Eastern European countries, and particularly in Poland, Czechoslovakia, and Yugoslavia, the liberated governments confiscated property holdings as penalties. As to this expropriation technique, the reported Nazi boast that whether Germany won or lost the war, Europe would never be the same again, has peculiar relevancy. The crimes set forth in immediate post-war legislation providing for the confiscation of property as penalty are many and the property takings were of far-ranging economic consequence.[29] Because of the racial and other persecutions of the Nazis, many properties were found abandoned, taken under the administration of the state, and never returned, or returned for occupancy only, under conditions of nationalization.[30] The takings of property held by Nazis or Nazi collaborators on penal grounds caused much economic wealth to fall in the hands of the sequestrating state. The evacuation of German or Volksdeutche populations from the territories of the liberated governments caused much property to come into the ownership of the state. Post-war taxes levied for punitive reasons or because of the cost of physical rehabilitation and reconstruction also caused property to revert to

[29] See Sections II-IV, *infra*.
[30] *Ibid*.

the state. The value of the direct and indirect property takings of the Eastern European countries under circumstances in which compensation was not legally required by Western standards cannot be accurately stated but it is submitted that the amount was substantial and that World War II not only furthered the economic need for nationalization but, in a very real sense, the nature of the war and its effect on property made it feasible for the state to commence total nationalization programs without assuming burdens of impossible compensation.

In this respect, an analysis of some of the relevant war damage, restitution, penal, and nationalization measures of three of the Eastern European countries—Poland, Czechoslovakia, and Yugoslavia—will afford illuminating insights.

II

POLAND

The general principles discussed above may be considered in the light of the sequence of laws, decrees, and regulations promulgated in and with respect to Poland in the years 1944 to 1946. It should be noted that the legislation and the regulations were enacted prior to the establishment of the present communist government in Poland.[31]

On August 31, 1944, in promulgating a decree with respect to the administration of punishment to Nazi criminals and to Polish traitors,[32] the Lublin Government designated as criminals persons acting on behalf of the German occupation authorities and prescribed as one of the penalties the confiscation of the entire property of the guilty person. The decree encompassed all activities of such persons from August 31, 1939, on. Similarly, a decree issued on September 6, 1944,[33] relating to agrarian reform, provided that apportionment of landed property without compensation to the owners should be made of the property of "citizens of the German Reich and Polish citizens of German nationality," of the property of persons guilty of treason to the state or of giving assistance to the occupation forces, or of the property of any person subject to the decree of August 31, 1944, referred to above. In a decree of September 7, 1944,[34] establishing housing commissions to adjust the housing question because of war damage, destruction, and the necessity of mass resettlement, housing commissions were directed to give particular consideration to the claims of persons who acquired rights to houses before September 1, 1939, and whose rights were later set aside by the occupation authorities.

In a law, dated May 6, 1945,[35] regarding abandoned and deserted property, provision was made for the restitution of property in Poland both movable and fixed, the possession of which was lost in connection with the war. It was provided, in general, that restitution would be granted if possession was lost as the result of

[31] February 6, 1947.
[32] Journal of Laws of the Republic of Poland, Decree No. 16.
[33] *Id.* Decree No. 17.
[34] *Id.* Decree No. 18.
[35] *Id.*, Law No. 17, Item 97.

abandonment, confiscation, agreement with the occupation authorities, or voluntary transfer, if the transfer was made to preserve the property from loss in connection with the war or the occupation. An Office of Temporary State Administration was created to manage abandoned and deserted property.[36] Property of the German state not yet taken over by the Polish state, or its organs, passed into the administration of the state.[37] A decree of March 8, 1946, provided a procedure for restitution of property belonging to persons who lost possession during World War II. The property of categories of Germans and others referred to in previous decrees would not be restituted to previous owners.[38]

In practice, from 1946 through 1949, persons attempting to assert rights under the restitution decree of March 8, 1946, faced increasing difficulties. Restitution of property rights to persecutees was hampered by the fact that many such claims involved assets of persons killed in the ghettos or in the German concentration and extermination camps in Europe. Such persons, considering their large numbers, had extensive property holdings in Poland; and considering the virtual extermination of the Jewish population of Poland, attempts to gain title to these properties usually required continuous search for relatives who might still be alive, and for death records and other vital statistics records, many of which were destroyed during the war. The obtaining of such necessary documentation involved considerable effort and expense, which in practice was very possibly greater than the value of the properties if recovered, and accordingly, rights to restitution were abandoned and the administration by the state resulted in property devolution to the state.

As time went on, restitution of property in Poland became less common, although the legal right, under the March 8, 1946, decree, to such restitution existed, because many of the small property holdings were, because of extensive war damage, reduced to only a fraction of their pre-war values. In many cases even if recovered by the former owners they would be valueless. Most of the buildings which were not completely destroyed during the war were damaged or suffered from pillage and lack of upkeep.[39] Heavy expenditures would have to be met for reconstruction and repairs. Rentals were held at a low level by law and strict controls, and such rentals in any event were taxed to such an extent that the balance left little to the owners and was not sufficient to cover maintenance cost. Sales values became proportionately small, and in any event, the proceeds could not be withdrawn from Poland because of the currency restrictions established by Polish authorities. Accordingly, of the bulk of properties seized, confiscated, or acquired under forced transfers by the Nazi occupants, little, in fact, was returned to the previous owners on the pre-1939 basis.

Restitution of property to previous owners did not encompass property which was either confiscated by Poland under previous decrees or nationalized by Poland under the Act of January 3, 1946, referred to later herein. The likelihood of former

[36] Ch. II. [37] Art. 2, par. 1. [38] Art. 2.
[39] Robotnik (Warsaw), June 23, 1948.

property owners asserting rights under the restitution decree would have been enhanced had war damage compensation been paid. A war reparations bureau attached to the Council of Ministries commenced registration of war damage by issue of questionnaires returnable not later than April 1, 1947.[40] While the questionnaire covered all possible types of war damage in a most detailed fashion, the information gathered was considered to be for statistical purposes and did not insure the payment of compensation by the Polish government. The entire question of payment of compensation for war damage has been deferred, presumably until the coming into effect of German and Austrian peace treaties containing reparations provisions. Accordingly, as yet no compensation has been paid for war damage suffered in Poland.

In the tabulation of war damage loss, persons injured were permitted to state loss suffered because of personal damages, including among others, physical disability, mental disability, loss of life of the head of the family, and moral losses (such as national, racial, political persecutions). In connection with property losses, persons were permitted to state household and personal property damage, loss of livestock and vehicles, loss of real estate, and damage to industrial establishments, commercial enterprises, and independent occupations. Other losses listed related to expulsion, destruction, confiscation, and theft, non-payment of money due, losses in connection with insurance and mortgage claims resulting from the destruction of real estate, limitation of profits, and illegal deprivation of freedom. Provision was made, as to each item, for a statement of the amount requested for indemnity.

Early in 1946 the Polish Provisional Parliament enacted a law[41] nationalizing Poland's key industries, "in order to restore the Polish national economy, to insure the economic sovereignty of the state, and to improve the general standard of living." The law provided for the taking over of enterprises on two bases, first, without compensation,[42] and secondly, subject to compensation.[43] The Polish Ministry of Industry at the time of the promulgation of the law affirmed that the Polish Government had adopted the principle of compensation "although it burdens the whole state and delays reconstruction."[44] The Minister of Industry stated, "I think I represent the whole nation when I say that just compensation should be paid to such an extent, in such form, conditions, and terms, that would not handicap the development of our economy."[45]

Categories of enterprises taken over, under the above law, by the state without compensation, for penal reasons, included the following: (1) Those owned by

[40] Effective April 1, 1947, the Ministry of Public Information was assigned problems in connection with damage which occurred on former Polish territory, the Ministry of Regained Territories was assigned war damage problems on former German territory, and the Central Planning Board was assigned the general problem as related to reparations and preparation of the German and Austrian treaties.

[41] Act of January 3, 1946, Journal of Laws of the Republic of Poland, No. 3, Item 17, effective February 5, 1946.

[42] Art. 2. [43] Art. 3.

[44] Warsaw Radio, January 2, 1946, statement by Hilary Minc.

[45] See also, 15 DEP'T STATE BULL. 651, 653 (1946).

the German Reich and the former Free State of Danzig. (2) Those owned by the citizens of the above two states, excluding persons of Polish nationality or of other nationality persecuted by the Germans. (3) Those owned by German or Danzig legal persons excluding public bodies. (4) Those owned by companies controlled theretofore by the German or Danzig citizens or by German or Danzig military authorities. (5) Those owned by persons who fled to the enemy.[46]

In the light of the principle that compensation would be paid only to the extent that it would not overburden the Polish economy, the effects of World War II may be noted in the following economic factors to be taken into consideration under the law: *first,* the general decrease of the value of the national assets as a result of the war; *second,* the reduction in the value of the enterprise as a result of war and occupation from September 1939 to the date of nationalization; and *third,* reduction in compensation to the extent of investment in the enterprise after September 1, 1939.[47] In the so-called "recovered territories" (East German territory placed under Polish administration as the result of the Yalta and Potsdam Agreements) an aggrandizement of the role of the Polish Government very naturally occurred. The evacuation of the German population resulted in the establishment, by 1949, of almost 5,800 state-owned farms in that area. In some 18 months, there were resettled in the "recovered territories" over 3½ million Poles from central and eastern Poland, especially Poles from territories ceded to the Soviet Union.[48] By the decree of November 13, 1946,[49] a national levy was imposed on private individuals, cooperatives, and state enterprises to raise some 13 billion zlotys for the reconstruction of the "recovered territories" by the Polish Government—*i.e.,* repairing, on a governmental basis, without recourse to private compensation.

III

CZECHOSLOVAKIA

World War II, for Czechoslovakia, is considered as having started on September 29, 1938, with the German invasion of the Sudetenland, and as having ended on May 19, 1945, with the first Benes decree invalidating legal transactions under the Nazi occupation.[50] At the end of the war Czechoslovakia had suffered less physical damage to property than the other Eastern European countries. Nevertheless, the German occupations had taken over many Czech properties, including the two more important banks and all of their assets. The Nazis had acquired large property holdings through the confiscation of Jewish and foreign capital. Nazi collaborators

[46] Art. 2, sec. 1, Act of January 3, 1946, *supra* note 41.

[47] Art. 7, sec. 5.

[48] Rzeczpospolita (Warsaw), November 15, 1946.

[49] Journal of Laws of the Republic of Poland, No. 61, Item 341.

[50] Title: "On the invalidity of certain legal transactions concerning property, entered into during the period of bondage; and on the State administration of property belonging to Germans and Hungarians, traitors and collaborators, and certain organizations and institutions." CODE OF LAWS AND ORDINANCES OF THE CZECHOSLOVAK REPUBLIC, No. 5/45.

had obtained large property holdings through forced transfers and the general pattern of German indirect looting had been carried on in a large scale.[51]

After the German surrender it was discovered that many enterprises crucial to the operation of the Czech economy were without owners or managers. In many instances management was taken over by workers' councils, later recognized by Czech law providing for state control of so-called "masterless enterprises" formerly owned by Germans, Hungarians, or Czech collaborators.[52] In a decree of May 19, 1945,[53] nullifying transfers of property, "entered into or undertaken under pressure occasioned by enemy occupation or by national, racial or political persecution on or after September 29, 1938," state administration was imposed on such properties "wherever this is necessary and essential in the interest of the continuity of production and economic life." In a Czechoslovak application of a principle which, as has been seen, was applied in Poland, the Benes government decreed that the following categories of persons were "nationally unreliable" and their property placed under state administration:

(1) Persons of German or Hungarian nationality.

(2) Persons who had engaged in activities generally understood to be collaborationist.

The decree listed a series of organizations in existence under the German occupation, and membership by Czechs in such organizations was considered automatically collaborationist.[54] All companies and legal entities were considered to be "nationally unreliable" if their conduct furthered the German or Hungarian war effort or "other Fascist or Nazi aims."[55] Czechs were considered to be of "German or Hungarian nationality" who "at any census of the population taken since 1929 declared to belong to the German or Hungarian nationality."[56] This would include virtually all of the population of the pre-war Sudeten areas of Czechoslovakia. The decree set up in detail the conditions under which state administration would operate[57] and resulted in the placing of a significant portion of the Czech economy under state control by the Benes government.

This immediate sequestration was followed by a set of decrees confiscating property outright and passing title thereto to the state. Thus, on June 21, 1945, it was decreed that all agricultural property owned by persons in the categories referred to in the earlier decrees cited above was to be confiscated immediately without compensation.[58]

It was provided that confiscated land would be administered by an agency of government until the land was redistributed.[59] Likewise, in a decree of October

[51] See note 1 *supra*.
[52] *Ibid*.
[53] Art. 5.
[54] Art. 15 *et seq*.
[55] 15 DEP'T STATE BULL. 1027, 1928 (1946).
[56] Art. 4.
[57] Art. 6.
[58] Presidential Decree No. 12. CODE OF LAW AND ORDINANCES OF THE CZECHOSLOVAK REPUBLIC, No. 7/45.
[59] Art. 6.

25, 1945,[60] Dr. Benes extended similar confiscation to all property with the exception of certain necessities like clothing, tools for trade purpose, et cetera.

In a law of May 16, 1946,[61] the 1945 decrees were implemented by providing for restitution of property rights held under state administration to "reliable persons in the eyes of the state" who had claims based upon the deprivation of property rights because of "the pressure of occupation or of national, racial or political persecution." This right to restitution did not extend to "persons unreliable in the eyes of the state,"[62] a new category broader than mere "enemies of the state" referred to above. In provisions for the presentation of claims against the state administrators of the properties under the 1945 decrees, an important requirement was "legitimization" of the claimant,[63] *i.e.*, proof that the claimant did not fall in the category of the "unreliable." As will be seen, the distinction between the "reliable" and the "unreliable" was perpetuated in the nationalization legislation for purposes of compensation.

Czechoslovakia, like Poland, commenced immediately, *i.e.*, in August 1945, the registration of war damage compensation claims. The provisions of decrees requiring registration of war damages in Bohemia, Moravia, and Silesia[64] were broad regarding the type of damages to be reported, including damage to health, real and personal property, and earnings by any act of war or occupation or by local Czechoslovak terrorist organizations.

Pursuant to the above decrees, laws were enacted which provided for preliminary allotments to Czechoslovak citizens who were in absolute need or who needed help to restore damaged property and buildings, or for a reduction in real estate taxes.[65] However, like Poland, Czechoslovakia did not enact any law which specifically provided for rates of compensation to be paid for war damages. At the most Czechoslovak war damage legislation provided for preliminary allotments against a subsequent determination as to the amount of compensation to be granted.[66] The enactment of compensation legislation has not as yet taken place, presumably on the theory that such legislation, if enacted at all, would be after the coming into effect of the reparation provisions of German and Austrian peace treaties.

By a law of May 15, 1946,[67] Czechoslovakia further adjusted the effects of the Nazi occupation by providing for reporting to the state the status of virtually all property in Czechoslovakia except state owned or administered. A detailed statement was required of the nature of the property, and its history with respect to increment or loss in value as the case might be, between January 1, 1939 and No-

[60] The definition of "enemy" also included Czechoslovak citizens who were of German or Hungarian nationality.

[61] CODE OF LAWS AND ORDINANCES OF THE CZECHOSLOVAK REPUBLIC, No. 55/46.

[62] Art. 5. [63] Art. 4.

[64] COLLECTION OF LAWS AND ORDINANCES OF THE CZECHOSLOVAK REPUBLIC, No. 54/45.

[65] *Id.* No. 161/46; No. 99/46.

[66] *Id.*, No. 161/46. Limited to a maximum of 25,000 kcs., Art. 6.

[67] *Id.*, No. 134/46.

vember 15, 1945.[68] Where the report showed an increase in property value, a severe tax was placed on the increase in value.[69]

Two other phases of relevant Czech legislation are noteworthy as indicating the parallel between Czechoslovakia and Poland. As has been seen, Czechoslovakia confiscated virtually all agricultural holdings in the Sudeten portion of Western Czechoslovakia. There commenced the forced migration of the divested population to Western Germany. The redistribution of the land in these areas was administered by local agricultural commissions under the direction of the Ministry of Agriculture. This was, primarily, on the basis of colonization, somewhat similar to that carried on in Poland, in which, among other persons, the Czech population was resettled from territory ceded by Czechoslovakia to the Soviet Union. Where land was confiscated in Czechoslovak territory outside of the Sudeten regions, landless workers and small farmers were given preference in the distribution. There also commenced in the Sudeten on a scale unknown in pre-war Czechoslovakia the organization of state-controlled farms. Thus began the genesis of the remarkable expansion of state-owned farms which occurred in Czechoslovakia under the communist government which came into power early in 1948.[70]

There remains to consider the nationalization programs in Czechoslovakia which commenced in October 1945 when the Benes government issued four decrees on nationalization. The first decree[71] covered almost all major industries such as mining, power, iron and steel, chemicals, armament and munitions, paper, textiles, and leather. Some of the industries, such as mining, power, iron and steel works, and chemical industries, were totally nationalized. Other industries were subject to certain limitations, the most important of which was the number of employees in each individual plant. Enterprises with less than 150 employees were not affected by the nationalization act. On the other hand, all plants employing on an average of more than 500 persons were subject to nationalization. Certain listed enterprises of 200, 300, or 400 employees were specifically brought within the nationalization decree. From time to time thereafter, other decress were promulgated nationalizing specific plants under the decree of October 24, 1945.

The second nationalization decree concerned all banks,[72] the third all private insurance companies,[73] and the fourth covered the basic branches of the food industry.[74] It should be noted that in the years which ensued after 1945, particularly after the communist coup of 1948, the area of nationalization was greatly extended. At the outset, however, the problem of compensation, formulated with due regard to the over-all problem of capacity to pay, was handled in a manner similar to that adopted in Poland. The theory of the Benes government was not modified to any significant extent by the communist government in the later nationalizations of

[68] Art. 2. [69] Art. 38. [70] See note 6 *supra*.
[71] CODE OF LAWS AND ORDINANCES OF THE CZECHOSLOVAK REPUBLIC, No. 100/45.
[72] *Id.*, No. 102/45. [73] *Id.*, No. 103/45. [74] *Id.*, No. 101/45.

1948. Two prime considerations of major interest in terms of this article were involved.

First, compensation was established at the current value of the property at the time of the nationalization, after the deduction of liabilities. In arriving at the amount of compensation, however, no weight was given to the value of unexploited deposits of raw materials, mining rights, or property devoted to social, educational, and similar purposes. The payment of compensation was to be in the form of Government bonds or, in specified circumstances, cash or other values. The bonds issued by the state for nationalized property were to be amortized by the excess profits of national enterprises. The payment of interest and the amortization of the bonds was guaranteed by the government.

Second, no compensation was to be paid under any circumstances for any nationalized property which at the end of the occupation or later belonged to (1) the German Reich, the Kingdom of Hungary, public persons under German or Hungarian law, the Nazi and Hungarian political parties and related organizations, or German or Hungarian corporations; (2) German and Hungarian nationals, except those loyal to Czechoslovakia who participated in its fight for freedom or suffered under the occupant; (3) natural persons who acted against the authority or unity of Czechoslovakia, its democratic republican form of government, or its safety and defense; or who induced others to act in such ways; or who consciously supported the German or Hungarian occupation authorities; or who earlier (during the period of danger defined by law) promoted Germanization or Magyarization in Czechoslovakia; or who acted against the interests of the Czechoslovak state or of the Czech and Slovak nations; and (4) persons who had tolerated such activities on the part of their business managers or had not exercised sufficient caution and good judgment in the direction of such managers.

If, to the exclusion of the above categories from obligation to pay compensation, there is added the fact that the Czechoslovak Governmnet resisted the payment of compensation of any nature for the holdings of foreign nationals, in the absence of compensatory economic concessions made by the governments of those nationals,[75] it will be seen how it became possible for Czechoslovakia, in terms of economic planning, to initiate and progressively to extend large-scale nationalization, ending with virtual total nationalization.

IV

YUGOSLAVIA

As in the case of Poland and Czechoslovakia, among the first formal acts of the post-war government of Yugoslavia was a decree concerning the transfer to state ownership of enemy property. This decree, effective February 6, 1945,[76] transferred to state ownership under the management of the state Administration of National

[75] See note 21 *supra*.

[76] *Politika* (Belgrade), Nov. 22, 1944. Official Gazette, February 6, 1945.

Property (1) all property of the German Reich and its citizens within Yugoslavia, (2) all property of persons of German race (Volksdeutsche) except those who fought in the National Army of Liberation or Partisan detachments, or those who were citizens of neutral states and did not act as enemies during the occupation; and (3) all property of war criminals and their accomplices without distinction as to nationality, and all property of persons condemned by civil or military courts to loss of property to the benefit of the state.[77] In addition, administration in trust was taken of property of absent persons who were carried off by enemy forces or fled during the occupation, the property of whom had been transferred to third persons under the pressure of, or by means of forced transfers accomplished by, the Nazi occupation authorities.[78] This decree applied to all types of property and was administered in conjunction with the basic collaboration law[79] establishing various defined acts under the occupation as crimes against the State.

In the latter law, effective September 1, 1945, confiscation of property was among the penalties for those who "economically collaborated with the enemy or occupation authorities by placing their industrial, commercial, transportation or other enterprises or their expert knowledge at the disposal of the enemy for purposes of production or who themselves produced commodities strengthening the economic power and war potential of the enemy."[80]

Effective May 25, 1945, the war profits law[81] provided for the seizure of war profits acquired during the enemy occupation. It applied to any property held on May 9, 1945, over and above what was possessed by the owner on April 6, 1941, and derived from purchases or acts performed during that period.

Two agrarian reform laws[82] enacted on August 5 and August 23, 1945, respectively, limited the size of agricultural holdings in order to effect distribution of land to peasants not actually engaged in agricultural pursuits. Large estates and agricultural holdings of banks, enterprises, stock companies, and religious institutions were confiscated without compensation.[83] On August 16, 1945, a law on the abrogation of mining privileges[84] provided that all Yugoslav mines became the property of the state.

So widespread in scope was the application of these penal measures, in which confiscation, without compensation of property, was a common penalty, that even prior to the promulgation of the new Yugoslav Constitution[85] and the enactment of nationalization laws, between 70 and 80 per cent of Yugoslav industry had passed under state control by this method.[86] With respect to industry, virtually all in-

[77] Decree of November 21, 1944, Art. 1.
[78] Art. 2.
[79] Passed August 25, 1945. Official Gazette, September 1, 1945.
[80] Art. 10.
[81] Official Gazette, May 29, 1945.
[82] Official Gazette, August 28, 1945.
[83] Art. 3, Law on Agrarian Reform and Colonization.
[84] *Politika* (Belgrade), August 17, 1945.
[85] *Constitution of the Federative Peoples' Republic of Yugoslavia*, approved by the Constituent Assembly on January 31, 1946.
[86] The Economist (London), January 19, 1946.

stances of sequestration of property resulted finally in formal confiscation or nationalization. As in Poland and Czechoslovakia, a restitution law, effective May 29, 1945,[87] provided for the restoration of property seized from owners by the occupants or their collaborators on racial, religious, national, or political grounds. All holders of such property were required to turn the property over to the proper units of the Administration of National Property.[88] Judicial remedies were provided for the return of the property to the owner by the Administration.[89] In the light of the nationalization laws, which were subsequently enacted, and other economic and tax measures, the amount of property so restored was not of great significance.

The nationalization measures were in two stages. Some 42 categories of private enterprise were nationalized in a law effective December 7, 1946.[90] Unless a sentence of confiscation had been pronounced against the owner, compensation was payable in the form of government bonds, or, in some cases, in cash as of the value of the net assets on the day the government took over the enterprise.[91] As to property sequestered prior to its nationalization, the value was taken as of the date the government commenced to administer it.[92] In April of 1948 an amendment to the basic nationalization law extended the application of that law to virtually all remaining enterprises in Yugoslavia.[93]

A letter addressed to the National Assembly of Yugoslavia by the President of the Economic Council, submitting reasons for the 1948 supplementation of the basic law on nationalization, throws light on a pattern which was pursued in all of the Eastern European countries.[94] After stating that the proposed nationalization extension would nationalize some 3,100 additional enterprises in Yugoslavia, the President of the Economic Council stated: "Henceforth there will no longer be in Yugoslavia industrial concerns which are not included within the social sector of our economy." The letter then commented on the relationship of war damage and nationalization as follows: ". . . the socialist sector of our economy germinated from the confiscation of property belonging to peoples' enemies and war profiteers. These confiscations did not come accidentally; they have not had a class background or revolutionary character. They have not been accidental just as was not accidental the national treason of the exploiting classes. . . . The confiscation of property belonging to the peoples' enemies represents the first stage of the socialist sector of our economy, because in the course of the struggle for the national liberation, profound revolutionary social changes took place in our country."

Yugoslavia, in a decree of April 10, 1945,[95] established a War Damage Commission for the purpose of reporting and classifying war damages. The categories of war

[87] *Politika* (Belgrade), February 18, 1946. *Law on Abandoned and Enemy-Alienated Property*, passed May 24, 1945.
[88] Art. 2.
[89] Art. 7.
[90] *Politika* (Belgrade), December 6, 1946.
[91] Arts. 10 and 11.
[92] Art. 9.
[93] Politika (Belgrade), April 29, 1948.
[94] Barba (Belgrade), April 29, 1948.
[95] Official Gazette, No. 20, April 10, 1945.

damage were defined in extremely broad terms.[96] As yet no war damage compensation legislation has been enacted in Yugloslavia and it is generally understood that the registration was for the purpose of compiling a reparations account to be utilized by Yugoslavia in connection with reparation provisions of World War II peace treaties.

V

Certain implications may be drawn from the economic history of the post-war years in Eastern Europe. These implications are of serious import and should be considered by students of the economic and political consequences of modern war. World War II demonstrated again that the structure of property rights and the economic fabric of societies are greatly weakened by war. Europe as a whole, before the Marshall Plan, faced a common problem of reconstruction and rehabilitation. The Eastern European countries, taking the path of non-Marshall Plan participation, moved step by step to the ultimate logic of total nationalization. In the 1945 beginnings, the liberated governments assumed the roles of administrator or sequestrator of economically significant properties pending reestablishment of the new economy. An important element in national planning for greater state ownership and control, where such ownership and control were deemed necessary for economic stability, was the question of the restoration of the rights of former property holders and the legal obligation to compensate. Clearly, conversion of economies from private enterprise to national ownership, if pursued in accordance with traditional principles of compensation, would entail prohibitive cost. The necessity of extending national ownership irrespective of cost dominated the economic thought of the liberated governments, and this was met, in large degree, by utilizing on a large scale the technique of confiscation without compensation. Superimposed on this technique were the policy of local compensation for nationalized property in long term blocked currency obligations and the policy of resistance to the nationalization claims of foreign nationals. Restitution legislation, the converse of confiscation legislation, while necessary in theory to justify confiscation, proved of little practical meaning in practice, given the necessity of large private expenditure for war damage repair and heavy taxation, if return of the property were asked. Even as to the early non-communist governments of Poland and Czechoslovakia, large sectors of the economy came under government ownership and control without compensation. Intermediate stages of administration or sequestration for temporary purposes quickly merged into state ownership or redistribution of property rights. When as a result of the political pressures asserted by the Soviets, following the basic political decision not to permit participation in the Marshall Plan, communist governments took over in Poland and Czechoslovakia, the process of state ownership and control had already far advanced due to the inexorable logic of the damage, disruption, and chaos caused by World War II.

[96] *Id.*, No. 44, June 26, 1945.

WAR DAMAGE COMPENSATION THROUGH REHABILITATION: THE PHILIPPINE WAR DAMAGE COMMISSION

ERNEST SCHEIN*

I

WAR CLAIMS—A GENERAL SURVEY

The palm which fashions war claims has a long life-line. Complications arising out of each destructive struggle appear almost to merge with the heated problems of the next. At this moment when the victims of World War II might be finding some encouragement from the progress of international negotiations and domestic legislation, vast areas of the still smoldering world are being devastated anew, creating grievances of greater and greater weight and complexity.

The dual question: (a) What constitutes a war claim and (b) What are the standards upon which it will be adjusted, cannot be answered categorically; but in developing the subject of this study, some of the attempts at its solution should be reviewed and discussed.

A. What Are War Damages?

When reference is made to war claims or war damages in treaties and domestic legislation, what is contemplated is the kind of loss for which compensation must be considered. Under the harsh rules of war, injuries derived from sanctioned military activity are not ordinarily accompanied by rights to relief. Compensable war losses result chiefly from requisition, seizure, detention, sequestration, confiscation, use, and destruction outside what is recognized as excusable incidents of hostility. Provision has been made for claims based upon torts, broken contracts, even loss of profits, interest, expenses and costs. The property involved may be real or personal, merchandise, commodities, household furniture, and clothing. In recent efforts to define the substance of loss for which reimbursement should be made, the American, British, French and Dutch governments have not undertaken to include currency or intangible property, and either have excluded completely or provided for in only limited amounts, articles of jewelry, works of art, and other luxuries.

In general, claims arising out of World War II will be defined by (a) international agreements, treaties, conventions, and exchanges of notes; (b) domestic law; (c) implicit principles, sometimes called the common international law, which govern the behavior of civilized nations.[1]

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[1] In this connection an applicable interpretation of the meaning of international law is found in Borchard, *The Place of Law and Courts in International Relations*, 37 AM. J. INT'L L. 46, 54-55 (1943): "International law is a system of normative rules, developed most actively from the seventeenth century

In the legislation of the United States, as well as allied countries, war damage has been defined very broadly. The recent report of the War Claims Commission points out that Congress deliberately omitted defining the term war claims under Section 8 of the War Claims Act rather than assume the risk of adopting a narrow definition. It was left to the Commission to make a study and at its end to recommend what claims should or should not be considered.[2]

B. What Are the Standards Upon Which War Claims Are Settled?

The creation and ultimate settlement of war claims during their long history have given rise to acknowledged principles which form a pattern or set of ground rules which are reliable in making the simplest adjustments. Thus, since during a war a belligerent government admittedly cannot take the time and trouble to buy all the property which it needs in emergencies, indiscriminate requisitioning becomes an accepted procedure, and requisition is always accompanied by the duty to make proper compensation to the owner.[3]

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to the early twentieth, which obtain their sanction not by force but by practice and cultivation among governmental authorities—state executives, ministers of foreign affairs, other public officials, and notably international tribunals of various kinds. Narrow as may be its scope in the total complex of international relations, and in constant danger of submersion or violation of politics, it nevertheless controls a vast field of human activity and is universally invoked both by governments and by individuals affected. Few violations escape public notice, and while the sanctions necessarily differ from those of private law, they nevertheless operate with considerable efficacy. States may differ as to what is the rule of international law, but no State would ever assert exemption from its control."

[2] War Claims Act of 1948, 62 STAT. 1240, 50 U. S. C. App. §§2001-2013 (Supp. 1950). The term "war claims" in pursuance of the authority given by Congress was defined by the administrative regulations of the War Claims Commission as follows:

"War Claims.—Shall include any loss, injury, or damage suffered or sustained by a person or business entity or organization, who, at the time of such loss, injury, or damage, was:

(a) a national of the United States, as hereinafter defined, who did not give aid or comfort to, or collaborate with any enemy or ally of enemy of the United States; or a branch or agency of the United States Government; or a regularly appointed, enrolled, enlisted, or inducted member of the military or naval forces of the United States; or an alien to whom the United States owes protection, such as an alien seaman signed on a United States vessel. Such loss, injury, or damage must be the result of action, not normally incident to the conduct of hostilities, by a branch or agency, civil or military, of any sovereign power who, by declaration of war or by military activity of its regular forces, was at war during World War II, such loss, injury, or damage being one which would not have occurred, but for the existence of a state of war; or

(b) not a national of the United States and not an enemy, or ally of enemy, as defined in section 2 of the Trading With the Enemy Act of 1917 (50 U. S. C. App. §2): Provided, That such definition shall not apply to a person who, after September 1, 1939, being resident within enemy or ally of enemy territory, or being a citizen or subject of such enemy or ally of enemy nation, was deprived of liberty, or did not enjoy full rights of citizenship under the laws of such enemy or ally of enemy nation, as a consequence of any law, decree or regulation, of the nation within which he resided, or of which he was a citizen or subject, discriminating against political racial or religious groups. Such loss, injury, or damage must be the result of an action, not normally incident to the conduct of hostilities, by the Government of the United States or one of its civil or military agencies. Such action must arise out of World War II and the loss, injury, or damage must be one which would not have occurred but for the existence of a state of war." (pp. 5, 6.)

[3] 2 MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 902 (1937). UNITED STATES ARMY RULES OF LAND WARFARE, §331: *"Private property susceptible of direct military use.*—All appliances, whether on land, at sea, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and generally all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is declared (H. R. 53, par. 2)."

On the other hand, reimbursement for the loss of prospective profits, interest, intangibles, money, luxuries, presents controversial elements to those endeavoring to meet demands for international understanding and domestic or unilateral legislation.

When liability is acknowledged, the measure of damages in claims of various categories has been considered but not always adequately dealt with in the making of awards. After World War I, the United States-Germany Mixed Claims Commission applied the following rule in the evaluation of plants and going concerns:

> In computing the reasonable value of plants and other properties at the time of their destruction, the nature and value of the business done, their earning capacity based on previous operations, urgency of demand and readiness to produce to meet such demand which may conceivably force the then market value above reproduction costs, even the goodwill of the business, and many other factors, have been taken into account. But this is quite a different thing from assessing damage for loss of prospective earnings or profits for a period of years computed arbitrarily or according to the earnings of competitors whose properties were not destroyed, and the awards made by this Commission do not embrace the items claimed of prospective earnings or prospective profits.[4]

The Special Mexican Claims Commission in its first decision describes the measure of damages which it employed in claims for loss or damage of property, as follows:

> The quantity and value of property of various kinds owned by the claimant as shown by inventories filed prior to the origin of the claim; the market value, original cost, and depreciation of the property; and deterioration through lack of attention directly attributable to acts of force. In this connection the Commission has applied the principle that, where the evidence does not satisfactorily establish a high or unusual value for property, an award should be made on the basis of the value of common or ordinary property of that class.[5]

Miss Whiteman in her work, after a review of the subject of damages in international reclamation proceedings, wisely concludes:

> It will be evident from the context of the decisions in the various cases that the amount allowed in any case should be that to which the claimant is reasonably entitled under all the circumstances.[6]

An additional standard to be followed in the making of awards determines whether the claimant is qualified to receive settlement. Specifically, should war damages be paid by a country only to its own nationals or to the nationals of allies, or even of neutrals, who suffered losses in their territories?[7]

Assuming that the appropriate claimant is identified, the basis of loss recognized,

[4] DECISIONS AND OPINIONS OF THE UNITED STATES-GERMANY MIXED CLAIMS COMMISSION 273, 308, 331, 704 (1925-1926).

[5] SPECIAL MEXICAN CLAIMS COMMISSION, REPORT TO THE SECRETARY OF STATE 21 (1940).

[6] 2 WHITEMAN, *op. cit. supra*, note 3, at 1549.

[7] A valuable study of this subject appears in Fraleigh, *Compensation for War Damage to American Property in Allied Countries*, 41 AM. J. INT'L L. 748 (1947).

and the measure of damages established, the question still remains: what effect has the compensation upon the rehabilitation of the country in which the war loss has been sustained? It is submitted that underlying the philosophy of equitable adjustment of losses incurred by victims of war is the ethical requirement that society should be restored after damage inflicted by belligerents. In provisions for indemnity or reparations, restitution in kind has always been an objective pursued where practically feasible. A systematic search for looted property follows the repulse of the enemy. There is universally prevalent a feeling for putting together the pieces which have been shattered by the forces of war.

Whatever method of claims settlement is finally adopted, the awards will be made principally by judicial boards or commissions.[8] Even if lump sum settlements in cash are negotiated between countries, the claims themselves will have to be adjudicated and the monies distributed by a commission or arbitral body. The settlement of claims of the United States Government and nationals against the government of Yugoslavia arising from the nationalization of properties for an amount of approximately seventeen million dollars was accompanied by the adoption of the International Claims Settlement Act of 1949 which established a Commission to make awards.[9]

Save in claims for breach of contract or the seizure of property through requisition, confiscation, nationalization, expropriation or other seizure—in short, except in those cases which are analogous to suits for the recovery of money—the trend in thinking about war damage compensation is towards rehabilitation. Even when claim for claim in connection with the loss of property in a war-devastated area is considered, it is total rehabilitation which is set as a goal. As in the physical rehabilitation of individual soldiers, the responsibility of the group dominates, so in the award of war damages, the aggregate restoration of what has been physically devastated, economically destroyed or damaged, must be dealt with on a country-wide or even area-wide basis.

Legislation of the United States dealing with the rehabilitation of the Philippines represents an historical accomplishment, as well as a guide for future undertakings of other interested states. Since this study will further concern itself only with the relation of war claims and war damage compensation to rehabilitation, the Philippine Rehabilitation Act of 1946[10] and the work of the Philippine War Damage Commission will be examined in some detail as valuable contributions to the development of the subject.

[8] Aside from the numerous Mixed Arbitral Tribunals created under the Treaties of Peace of 1919-1920, some sixty such tribunals have functioned during the past hundred years. MANLEY O. HUDSON, INTERNATIONAL TRIBUNALS, PAST AND FUTURE 196 (1944).

[9] International Claims Settlement Act, Pub. L. No. 455, 81st Cong., 2d Sess. (1949).

[10] Philippine Rehabilitation Act of 1946, 60 STAT. 128, 50 U. S. C. App. §§1751-1806 (1946).

II

PHILIPPINE REHABILITATION—A SPECIFIC CASE HISTORY

A. Background

President Roosevelt only voiced the sentiments of many other Americans when he told the people of the Philippines that they would get back everything they lost in the war to the last nipa hut and the last carabao. War damage compensation, strictly construed, became absorbed in the concept of rehabilitation, and traditional legal grounds for the collection of claims under international law yielded to the pressure of what was a whole nation's humane viewpoint.

The American who suffers war damage to property on territory of the United States during a war knows that compensation somehow will be provided by his own government. Specifically in providing for losses in World War II, an Act of Congress of March 27, 1942,[11] authorized and directed the War Damage Corporation to provide premium insurance effective not later than July 1, 1942, against war losses, with such general exceptions as the War Damage Corporation, subject to approval of the Secretary of Commerce, might deem advisable. Coverage was not extended to property in the Philippine Islands, however, because lack of control by the United States made protection impracticable during the period of occupation by the Japanese.

The Act further expressly provided that subject to the same limitations prescribed with respect to premium insurance, the War Damage Corporation might compensate for losses after December 6, 1941 and prior to the effective date of the premium insurance program, July 1, 1942, without requiring a contract of insurance or the payment of premiums. The free insurance, of course, terminated automatically on July 1, 1942.

By September 30, 1944, claims and notices of contingent or prospective claims, totalling 393 in number and property values of more than one hundred thirty-five million dollars, alleged to have risen in the Philippine Islands prior to July 1, 1942, had been presented to the War Damage Corporation. No payments were made, both because of the inaccessibility of the area for purposes of investigation and adjustment, and the general sentiment that Congress wished to deal with the subject on a special basis when the occasion arose.

Early in 1945, it was proposed to amend Section 5(g) of the Reconstruction Finance Corporation Act relating to the War Damage Corporation respecting losses in the Philippine Islands[12] in two major respects: (1) to broaden the definition of war damage; (2) to extend automatic free insurance on property in the Philippine Islands (with designated exceptions) beyond the date of July 1, 1942.

During the Senate hearings on the proposal, a letter from Mr. Jesse Jones, then Chairman of the Reconstruction Finance Corporation, to Senator Millard Tydings, Chairman of the Committee on Territories and Insular Affairs of the United States

[11] Pub. L. No. 506, 77th Cong., 2nd Sess. (1942).
[12] S. 104, 79th Cong., 1st Sess. (1945).

Senate, dated December 4, 1944, was read.[13] Among other things, Mr. Jones stated:

> To summarize, it seems to me that Congress should enact legislation with respect to the overall Philippine situation and should provide for the payment of appropriate compensation for property damage due to combat operations in the Islands *throughout the period of enemy attack, enemy occupation and our reoccupation.* Since such compensation will have close connection with general relief and rehabilitation in the Philippines, it may be that Congress would want the whole Philippine problem handled by a Filipino Rehabilitation Commission, the members to be appointed by the President and approved by the Senate.[14]

It appeared further in the course of the proceedings before the Committee on Territories and Insular Affairs that the United States Army in the Philippines took for its own use during the emergency considerable private property without being able to follow formal procurement procedures. Claims for such property, even if informally appropriated, could be paid out of customary War Department appropriations. However, claims for property destroyed to prevent capture by the enemy, which was a common practice, were not payable from available funds or under established regulations.

The Commanding General of the United States Armed Forces in the Far East had already organized a Claims Service in the Philippine Islands for the settlement of contract or procurement claims as well as torts.[15] That such claims should be settled as promptly as possible was considered not only a military necessity, but politically expedient in promoting friendly relations with the inhabitants.

The adjustment of losses as a military measure fell short of what we proposed to do for the Philippines. Moreover, the payment of claims for damages on the basis of insurance adjustments appeared woefully inadequate. The terms of the proposed bill to change the War Damage Corporation's powers, it was admitted, did not approach our goal, even on a limited basis. For instance, losses of office buildings, factories, and mechanical installations, were covered, but compensation was

[13] *Report of Proceedings, Hearings before Senate Committee on Territories and Insular Affairs on S. 104*, 79th Cong., 1st Sess. (1945).

[14] The Act of March 7, 1942 (Pub. L. No. 506, 77th Cong., 2d Sess. (1942)) provides in part as follows: "Such protection shall be applicable only (1) to such property situated in the United States (including the several states and the District of Columbia), the Philippine Islands, the Canal Zone, the territories and possessions of the United States, and in such other places as may be determined by the President to be under the dominion and control of the United States. . . . The War Damage Corporation, with the approval of the Secretary of Commerce, may suspend, restrict, or otherwise limit such protection in any area to the extent that it may determine to be necessary or advisable, in consideration of the loss of control over such area by the United States, making it impossible or impracticable to provide such protection in such area."

[15] As to service-connected tort claims resulting from noncombat activities of the Army: Under the provisions of the Act of July 3, 1943 (57 STAT. 372, 31 U. S. C. §222b (1946)), the War Department is authorized to settle claims on account of damage to or loss or destruction of property, and reasonable hospital, medical and burial expenses actually incurred on account of personal injury or death caused by Army personnel acting within the scope of duty or otherwise incident to noncombat activities of the Army. Under the provisions of AR 25-25, the Army regulations implementing the provisions of the act of July 3, 1943, the War Department does not pay claims for damage to or loss or destruction of property or for personal injury or death resulting from action by the enemy or resulting directly or indirectly from any act by the Armed Forces engaged in combat.

specifically excluded for growing crops, orchards, personal apparel, and household furniture, which obviously formed the aggregate of the wealth of a simple Filipino family.

More than anything else, the reluctance of the Senate Committee to act along traditional lines was prompted by the conviction that ordinary war damage compensation went only a short distance towards actual rehabilitation—the rebuilding of the physical equipment and economy of a country despoiled by war. It was decided to refer S. 104 to the Philippine Rehabilitation Commission,[16] with a request that they examine the requirements and report back a program which would be a constructive solution of the Philippine problem.

No measure was ever projected by the Congress which was intended primarily to reimburse individuals or organizations for specific damages incurred in the war. The aim was to assist and encourage rehabilitation, the rebuilding of the physical, economic and social structure of the Philippines. The bill, S. 1610, introduced in the Senate for the purpose of attaining these high purposes, suffered the usual legislative vicissitudes, in the course of which the original objectives of the proposed law became confused and distorted.

The first conception, as has been indicated, was not a private class measure for the payment of war losses. In attempting to provide for practical implementation, however, this type of measure dominated the thinking of the law-makers. There was no denying the influence of the procedures of the past. Claims commissions, international, national or other arbitral bodies, had always awarded compensation determined according to certain standards. Therefore, a commission had to be set up, the duties and responsibilities of which comprised a mixture in which direct rehabilitation was only one ingredient. Economy-minded and high-principled public servants laid the greatest emphasis upon the setting up of standards to minimize fraudulent practices which might be costly to our Treasury and a menace to our moral code.

The Philippine Rehabilitation Act[17] emerged with the word "rehabilitation" in its title and with very substantial provisions for the assistance of the Philippine rehabilitation program. However, its language from the very beginning refers generously to "compensation for war damage." The agency which it established is known as the Philippine War Damage Commission, the discharge of its duties embracing a combination of welfare payments to the lowly, adjustment of losses—analogous to the payment of insurance benefits—to more substantial property owners, and the granting of funds which contributed in part to the overall program of physical rehabilitation adopted by the Republic of the Philippines.

[16] Created by Act of Congress approved June 29, 1944. For a summary of pertinent legislation, see HARRY BARTO HAWES, REHABILITATION OF THE PHILIPPINES (1944).

[17] Philippine Rehabilitation Act of 1946, 60 STAT. 128, 50 U. S. C. App. §§1751-1806 (1946).

B. The Philippine Rehabilitation Act of 1946

1. *Title I—War Damage Compensation*

The Philippine War Damage Commission consisted of three members.[18] The time limit of its functions was set at two years after the expiration of the time for filing claims, and in no event later than five years from the enactment of the Act, which was April 30, 1946.[19]

The Commission was charged with the functions of receiving, investigating, approving, and disapproving war damage claims covering properties lost, destroyed or damaged during and as a consequence of World War II in the Philippines, and of making payment, replacement or restitution for such loss in accordance with the law. In exercising these functions, the authority of the Commission is in lieu of and supersedes that which was previously conferred on the War Damage Corporation.[20]

Losses to be considered by the Commission must have been the result of one or more of the following: (1) enemy attack; (2) action taken by or at the request of the forces of the United States to prevent property from coming into the possession of the enemy; (3) action taken by civilian or military representatives of enemy or governments cooperating with it; (4) action of the Armed Forces of the United States in opposing, resisting or expelling the enemy; (5) looting, pillage or other lawlessness or disorder accompanying the collapse of civilian authority determined by the Commission to have resulted from any of the other perils or from control by enemy forces.[21]

Qualified claimants are (1) those who have an insurable interest in the property alleged to be lost, as owner, mortgagee, pledgee or lien holder; (2) any heir, devisee, legatee or distributee of a deceased person's interest; (3) executor or administrator of the estate of a deceased person for the benefit of such heir, devisee, legatee or distributee. The claimants must come under one of the following categories: (a) a citizen of the Philippines or the United States on December 7, 1941 and continuously to the date of filing claims; or (b) a citizen of a nation not an enemy of the United States in World War II, if he had been a resident of the Philippines at least five years prior to December 7, 1941, provided that the country of which he is a citizen grants reciprocal war damage payments to American citizens resident therein; or (c) a person who served honorably in the Armed Forces of the United States or Commonwealth of the Philippines or the Merchant Marine; or (d) a church or religious organization; or (e) an unincorporated association, trust or corporation (or their successors if already dissolved), organized pursuant to the laws of the several states of the United States or territory or possession, including those

[18] Filipino member is Francisco A. Delgado; American member John Young was succeeded by John A. O'Donnell; Frank A. Waring was the chairman.

[19] 60 STAT. 128, 50 U. S. C. App. §1751(d) (1946).

[20] 60 STAT. 129, 132, 50 U. S. C. App. §§1752, 1759 (1946).

[21] 60 STAT. 129, 50 U. S. C. App. §1752(a) (1946).

organized pursuant to the laws in effect in the Philippines, but excluding corporations wholly owned by the Philippines.[22]

Specifically disqualified from receiving war damage compensation are: (1) enemy aliens; (2) collaborators and disloyal persons; (3) any unincorporated association, trust, corporation or sociedad anomima owned by any such persons. Payment is barred (1) if loss or damage to the property was insured, except for the excess of the value over the face value of the insurance; or (2) if the loss or damage is one for which the War Department or Navy Department is authorized to make payment; or (3) if the loss or damage is payable or has been paid or is authorized to be paid by the Government of the United States or the Government of the Philippines, unless such payment was declined; or (4) if the claimant does not file a claim in reasonable conformity with the law within twelve months after the opening date set by the Commission for filing.

All property is subject to compensation, except the following (in general): (1) Accounts, bills, records, films, plans, drawings, formulas, currency, deeds, evidences of debts, securities, money, bullion, furs, jewelry, stamps, precious and semi-precious stones, works of art, antiques, stamp and coin collections, manuscripts, books and publications more than fifty years old, models, curiosities, objects of historical or scientific interest, and pleasure aircraft, unless such are included in inventory, supplies or equipment for carrying on a trade or business within the Philippines; (2) vessels and watercraft, their cargoes and equipment, with certain exceptions; (3) intangible property; (4) property diverted to the Philippines by authority of the United States Government, or otherwise as the result of war conditions; (5) property in transit which was insured against war perils or with respect to which insurance was available.[23]

Claims are provable either for (a) actual cash value at the time of loss or destruction or damage; or (b) the actual cost of repairing or rebuilding or replacing with other property of like quality, whichever is less.[24] In lieu of cash payments, the Commission may, at its option, make payments in whole or in part of the amount payable by replacing lost, damaged or destroyed property with any other property of like or similar kind; and the Commission is authorized to acquire such property, to have such work done, to make contracts, and to take such other action as may be necessary for the purpose; and surplus property of the United States may be transferred to the Commission at a fair valuation, to be used in settling claims.[25]

Before payments are actually made to claimants, the Commission is directed to require that lost, destroyed or damaged property be rebuilt, replaced or repaired, provided that in the event that the Commission determines that it is impracticable to do this, payments may be made subject to the further requirement that they be

[22] 60 STAT. 129, 50 U. S. C. App. §1752 (1946).
[23] 60 STAT. 133, 50 U. S. C. App. §1760 (1946).
[24] 60 STAT. 129, 50 U. S. C. App. §1752 (1946).
[25] 60 STAT. 130, as amended, 60 STAT. 805, 50 U. S. C. App. §1754(b) (1946).

reinvested in such manner as will further the rehabilitation or economic development of the Philippines.[26]

Claims up to $500, those of the little man, were to be paid in full and as quickly as allowed.[27] Of larger claims, the excess above $500 is arbitrarily reduced by 25 per cent.[28] A pro rata, not exceeding 80 per cent, applicable to all claims, was authorized to be paid immediately upon allowance. Remaining funds are to be distributed pro rata among allowable claims.[29]

The War Damage Commission notifies the claimants of the approval or disapproval of their claims, and dissatisfied claimants are entitled to a hearing on appeal before the Commission, or its representatives, under such rules and regulations as may be prescribed, the decision of the Commission to be final and not reviewable by any court.[30]

Penalties are provided for fraud[31] and a 5 per cent limit is placed on fees.[32]

The total authorization of Congress for the payment of private claims was four hundred million dollars. Of this amount twelve million dollars ear-marked for administrative expense will probably not be exhausted by the Commission.[33]

Money or bullion received by the United States from Japan is to be used (1) to reimburse the Treasury for sums appropriated; (2) to satisfy unpaid balances of approved claims; (3) to make up the 25 per cent by which claims were first reduced; (4) to pay any approved claim of the Philippine Government or its subsidiaries not compensated under the Act. The balance will also be covered into the Treasury of the United States.[34]

2. *Title II—Disposal of Surplus Property*

To expedite the disposition of surplus property of the United States in the Philippines as well as to aid in physical rehabilitation, there was transferred to the Government of the Philippines, provinces, chartered cities, and municipalities, property of a fair value, estimated by the Foreign Liquidation Commissioner, not to exceed one hundred million dollars.[35]

3. *Title III—Restoration and Improvement of Public Property and Essential Public Services*

As a manifestation of good will to the Filipino people, appropriations of one hundred twenty million dollars were approved for the following purposes: (1) to plan, design, restore, and build roads, streets, and bridges, and to train ten Filipino engineers in the construction, maintenance, and engineering necessary for efficient and safe operation of highway transport facilities; (2) to rehabilitate and improve port and harbor facilities and to train ten Filipino engineers for this work; (3) to compensate the national Philippine Government, provincial governments, chartered

[26] *Id.* §1754(c). [27] *Id.* §1754(a). [28] *Id.* §1752(a).
[29] *Id.* §1754(a). [30] *Id.* §1763. [31] *Id.* §1757.
[32] *Id.* §1758.
[33] *Id.* §1756(a). The original allowance for administrative expense of $4 million was increased.
[34] *Id.* §1756(b). [35] *Id.* §§1801-1806.

cities, municipalities and corporations wholly owned by the Government, for physical loss or damage to public property during and as a result of the war; (4) to help in the rehabilitation and development of public health services.[36]

Appropriate agencies of the United States are designated to assist in directions within their respective jurisdictions towards the goal of complete rehabilitation. The restoration and improvement of inter-island commerce is assigned to the Maritime Commission; air navigation to the Civil Aeronautics Administration; meteorological equipment to the Weather Bureau; the fish industry to the Department of the Interior; coast and geodetic survey to the Commerce Department. In all instances the training of Filipino specialists is emphasized.[37]

4. *Titles IV, V, and VI*

The Act contains general provisions incidental to its execution. Rehabilitation is involved directly only in the authorization of the expenditure of five million dollars for the restoration, repair, and improvement of public buildings of the United States and the acquisition of housing for civilian agencies in the Philippines.[38] It was under the last general power that the War Damage Commission procured efficient space in specially constructed buildings which at the end of its program will become the possessions of the Republic of the Philippines.

C. Experience of the Philippine War Damage Commission

Time and space have been given liberally to a summary of the organic act of Philippine rehabilitation since from this more than anything else can the essential inconsistencies of the undertakings of the War Damage Commission be evaluated. Moreover, it brings into focus a rehabilitation program, based on the principle of war damage compensation, ideally conceived, but implemented by legislation the detailed provisions of which are fraught with weaknesses inherent in considerations of politics, nationalism, and narrow legal traditions. For further enlightenment and possible practical assistance in future undertakings with like objectives, we may direct our attention profitably to some of the experiences of the Commission which even as this paper is being written hastens towards the completion of its difficult and significant assignment.

The challenge and danger of the task of the War Damage Commission were first posed in the assembling of staff personnel in the United States. Although the law specifically excluded any regard to the civil service laws or the Classification Act of 1923, as amended,[39] it was to be expected that Commissioners, fabricating what they perceived as another government agency, should call upon civil service experts for advice in employment procedures, and follow, as far as practicable, the routine established in other departments. The advantages in regularity are obvious, but so are shortcomings in the direction of elasticity of employment, transfers, and separations which the legislators in fact sought to avoid.

[36] *Id.* §§1781-1785.
[37] *Id.* §§1786-1791.
[38] *Id.* §§1796-1797, 1801, 1806.
[39] *Id.* §1751(b).

Despite the language of Congress and the patent intent to encourage and support a rehabilitation program, limitations are further implicit in the wording of the Act, recognizable as conventional devices for the payment of claims against the government. The Commission from its inception was faced with the necessity of setting up the machinery and equipment of a claims agency. Forms were prepared by men in the United States accustomed to the mechanics of administrative bodies, but unfamiliar with the customs, experience, and language of the people of the Philippines. They were obviously ignorant of the fact, as evidenced by the forms which were prepared, printed, and circulated, that most of the eighteen million or more Filipinos residing in the Islands at the time did not use English as a language at all, and that most of the remainder would not be familiar with the idiom employed by lawyers or government claims agents in the United States.[40]

An American crew of skeleton proportions arrived in Manila in the autumn of 1946, occupying housing facilities principally in special quarters at the Manila Hotel, and using office space in a building which had survived the general demolition. This equipment was procured largely through the zealous efforts of the Chairman and the Filipino member of the Commission. Local help was recruited and performed most satisfactorily.

Since a distinction could be drawn between Titles I and III of the Act, relating respectively to private and public claims, separate divisions could be and were set up under the same administrative head for the implementation and execution of these programs. The differences between what on the one hand were essentially claims payments, relief, and welfare doles (although, to be sure, the actual payment of money in large amounts would be expected to have an effect on the economy of the country), and what on the other hand were contributions towards the physical rehabilitation of devastated areas, indicated throughout the history of the Commission the diverse patterns and philosophies implicit in the two approaches to war damage compensation.

1. *Private claims*

The language of the Act, despite its ostensible objectives in the field of rehabilitation, required the early adoption of rules and regulations which set up conditions, requirements, procedures, rules, and limitations sounding very much like those of claims agencies in the most orthodox tradition.[41]

The period for filing claims as required by the statute extended from March 1, 1947 to February 29, 1948. The Bureau of Public Schools of the Philippines was employed to distribute forms to teachers who, in turn, were delegated the responsibility of issuing them to interested parties. The Commission maintained a publicity department, amply staffed, which gave widespread information in English and in

[40] See P.W.D.C. form 100 (basic claim forms); 100A (supplement for watercraft and automobiles); 300 (return receipt card); 1-1 (circular of general information). Filipinos employ 8 languages, 87 dialects.

[41] *Rules and Regulations of the United States-Philippine War Damage Commission*, 11 FED. REG. 13337 (1946); 12 *id.* 813 (1947); 44 CODE FED. REGS. §801-803 (1949).

the local dialects through all available media, including newsprint, radio, and sound trucks. Branch offices in several localities in the Islands were installed and maintained not only to decentralize activities, but also (a) to offer facilities for filing in areas distant from Manila; (b) to assist the Commission in making investigations in larger claims and in special instances where circumstances demanded; and (c) to observe and record the reactions to the work of the Commission in local communities, which, in the scattered archipelago of the Philippine Islands with their diversity of races and tongues, naturally would be far from uniform.[42]

By the end of the filing period, approximately 1,250,000 private property claims had been filed. Of these, more than one million had a claimed value of not more than $500 each. Claims having a claimed value of more than $50,000 each numbered less than 1700.

The vast volume of individual cases made impossible the careful and conventional claims procedures originally contemplated by the American personnel which in large proportion had been recruited from Washington agencies dealing with claims against the government. The respect of the Commission for the cautious approach which was obviously favored by many legislators in dealing with the Philippines notwithstanding, no investigation worthy of the name could be made of all of the smaller individual claims. The obstacles became very tangible in dealing with remote territories, broken down transportation facilities, and ignorant, often illiterate, claimants.

Every element considered, the incidence of fraud was probably no greater than is assumed as a calculated risk in the adjustment of claims by insurance companies and other claims agencies in the United States during peace times. It is almost accepted practice for claimants to ask for more than they hope to recover. A reasonable degree of exaggeration must be overlooked in very much the same way as civil courts regard the inflation of damages claimed in an accident case beyond what the plaintiff hopes to recover. The excessive *ad damnum* is taken with a grain of salt, but is not ordinarily held to be prejudicial.[43]

In the early record of the Commission an indication can be found of what any effort to make individual personal checks and investigations of claims might have

[42] There are 7083 islands in the Philippines; three main racial groups—Negrito, Indonesian, Malay. Branch offices were maintained in: Baguio City; Cagayan; Cebu City; Cotabato (Davao City); Iloilo (Bacolod City); Legaspi; Manila (Cabanatuan, San Pablo City); Tacloban; Tuguegarao; Zamboanga.

[43] Hunt, the American Agent reporting the American and Panamanian Claims Arbitration under the Conventions of 1926 and 1932, says (Report, p. 11): "Experience has shown . . . that in practically every general arbitration some of the most persistent and most vehement claimants are those whose claims are shown by examination to be unfounded, either in fact or in law." Also see HUDSON, *op. cit. supra* note 8: "The amounts claimed against States are easily exaggerated. A public purse always looms large in the eyes of a claimant. Hence the total of the awards made by a tribunal is frequently out of all proportion to the total amount of the claims presented to it. Following the Civil War in the United States, British claims were presented to the amount of $6,000,000, but less than $2,000,000 was awarded by a claims commission; French claims totaled $3,500,000, but less than $650,000 was awarded. The 1868 American-Mexican Commission awarded less than one percent of the amount claimed by each Government from the other; the 1910 American-British tribunal awarded less than two percent of the amount of the American claims, and only four percent of the British claims."

entailed. The development of standard procedures for the settlement of the stupendous volume of claims of small size, without individual investigation, resulted in the gradual increase of the volume adjudicated from about 3,000 in July to 16,414 in November, 1947, with every prospect of a proportionate increase each month. Due to the disclosure in November, 1947 of evidence indicating the possible existence of fraud in several hundred small claims in a minor locality, the Commission decided to discontinue disposing of cases, however small, without individual check-up in the field. The volume of adjudicated claims dropped from about 6,200 in December, 1947 to less than 3,000 in January, 1948, and to smaller numbers thereafter until the realistic policy of standardized examination of small claims without individual investigation, except in particular instances, was resumed. When the full impact of this policy was realized, claims settlement zoomed so that by December 31, 1949 the Commission had processed 927,000 small claims.

More fundamental and more immediate than the adoption of measures to counteract attempts at fraudulent enrichment was the development of standards of value which would, in a practical sense, contemplate the restoration of property destroyed or damaged during the war. If there was any substance in the rehabilitation aspect of the work of the Philippine War Damage Commission, such an objective had to enter into its deliberations.

The Act imposed the restriction of paying to successful claimants the actual cash value of property at the time of loss or injury; or in the alternative, the cost of repairing, rebuilding or replacing the same with other property of like quality; whichever was less. The technicians of the Commission undertook, through exhaustive research, to determine valuations of types of articles which were recurrent in claims and to prepare tables of depreciation. Thus, if a printing press had been acquired new in 1935 at a certain price, its valuation at the time of loss could, according to the tables prepared by the Commission, be determined. The more complicated problems arising in connection with growing crops, like sugar, rice, tobacco, hemp, cocoanuts, and corn, indigenous to the Philippines, or with animals in being, but not born before December 7, 1941, presented categories of head-splitters which were weighed by the Commission after hearings of interested parties, as expediency dictated and the limitations of the Act required. The question remained open always of whether the true aims of rehabilitation are being observed when the value of property at the time of loss, or the cost of repairing, reconstruction, or replacement, *whichever is less,* is the basis of compensation. Doubts become accentuated when there is adopted as a basis of compensation a formula for settlement establishing not even the cash value at the time of loss or damage (which, in all instances in the Philippines, was less than the replacement value), but *reduced values determined according to preconceived tables of depreciation.*[44]

It must be said in fairness that the Philippine War Damage Commission was

[44] For a discussion of values in reparations, see Gide, *The Indemnity for Reparations,* 104 ANNALS 140, 142 (November, 1922).

restricted in the first instance by law from awarding replacement values if they were more than the cash value at the time of loss. But, it is submitted, the Commission, in adopting rigid standards which embraced, where applicable, the use of depreciation tables or predetermined standard values for frequently recurring items of the lowest figure consistent with any degree of fairness, went farther than was required. It is safe to say that in connection with the compensation for loss or damage in privately owned property, no practical consideration was given to reconstruction or replacement values. Add to this the obstacles in the way of making restitution in kind of lost property and you find a situation where true rehabilitation is a remote concept.

The most common claims before the Commission were based upon total or partial destruction of small homes; simple tools; work animals, mostly carabao, pigs, chickens; and stocks of wood. These were usually inadequately identified. Not all of the claimants had the patience or artistry of one from Dipolog, Zamboanga, who not only enumerated his personal belongings and described them in detail, but portrayed them with rare skill in drawings, some of them colored. He elaborated upon each item with such detail as "muslin (cocoa) blanket bedspread combination, beautifully embroidered by my wife; when we arrived in Cebu the work was done; she was a school teacher, but when I took her to Cebu she stayed at home to comfort her life companion."

Obviously, restoration in kind in these instances was a virtual impossibility, and in the case of antiquated equipment, was not even desirable. The only acceptable method of coping with the problem of compensation for such losses was to develop a set of values for the smallest and most frequently mentioned items, a rule of the thumb, as it were; and for the valuation of more considerable property, a system of appraisal worked out specifically for real estate, machinery, equipment, and merchandise; and to pay the claimants in cash.

Congress, in considering and adopting the war damage legislation under which the Commission functioned, placed much emphasis upon the rehabilitation program and the devotion of the funds provided to the rebuilding of a devastated area, but, nevertheless, recognized that the the implementation of such a program would defy the best efforts of an administrative agency. In committee the original proposals were amended as follows:

> PROVIDED, That if the Commission determines it is impossible for any reason beyond the control of the claimant, or is impractical to rebuild, replace, or repair the lost or damaged property, the Commission may make payment to the claimant without making said requirement: PROVIDED, however, That, as a condition to the making of such payment, the Commission shall require that the whole of such payment shall be reinvested in such manner as will further the rehabilitation or economic development of the Philippines; AND PROVIDED further, That nothing in this subsection shall preclude the partial payment of claims as the rebuilding, replacing, or repairing of the property progresses.[45]

[45] 60 STAT. 131, as amended, 60 STAT. 805, 50 U. S. C. App. §1755 (Supp. 1950).

The Commission has reported that a survey which it conducted demonstrates that the little claimant who received an award is rehabilitating himself and his family with war damage payments; that he is buying tools and work animals and repairing his home and his store, endeavoring to reconstruct himself as the mainstay of an agrarian land.

In the period July 1 to December 1, 1949, the Commission made an analysis of the use which large claimants—industry, business and agriculture and all of those who contribute most to employment and general rehabilitation—are making of their payments. Without question, they, like Juan de la Cruz,[46] have utilized the money they have received to benefit materially the processes of economic recovery, although the funds have been far from sufficient to provide complete restoration of lost or damaged property.[47]

Further, it is reported that in small claims processed by December 31, 1949, the claimants had been paid approximately $127,085,000 of the total $400,000,000 authorized in the Act. Of approximately 1,000 claims having a face value of more than $50,000 each completed by December 31, 228 were disallowed because of ineligibility of claimants under the law, and the remainder by allowance and initial payments aggregated $35,000,000. The Commission announces that actual reinvestment of this group in the economy in the Philippines was estimated to be $116,000,000 during the same period. The survey also disclosed that 274 claimants who were paid a total of something less than $27,500,000 had actually reinvested $108,000,000 *prior* to award by the Commission. It would not be wide of the mark to conclude that much more than this amount was invested in postwar Philippine construction and business before the Commission got around to making payments.

Despite the best efforts of the Philippine War Damage Commission resulting in some sort of record attached to the completion of its task in settling almost 1,250,000 private claims before the expiration of the time limit set by Congress, and with less administrative expense than authorized, there was an essential lack of realism in the whole operation measured by the requirements of a true rehabilitation program. Among many elements in the account, which we need go no farther to find than the experience of the Commission in handling private claims, are the following:

(1) The law itself, although sounding in language of rehabilitation, actually imposed the restrictions of a claims agency.

(2) There were obstacles even to the adoption of ordinary claims procedures because of the volume and small size of the claims which actually called for relief or welfare donations.

(3) The specific requirement that compensation should be made for property lost or damaged on the basis of the cash value at the time of loss or damage *or* replacement or reconstruction value, *whichever was less,* disregarded fundamental principles of rehabilitation which have to do primarily with replacement, restoration, reconstruction, and improvement. To this was added the additional limitation of

[46] The "John Smith" or little man of the Philippines.

[47] UNITED STATES-PHILIPPINE WAR DAMAGE COMMISSION, SEVENTH SEMIANNUAL REPORT FOR PERIOD ENDING DECEMBER 31, 1949 3 (1950).

the procedures of the Commission which, in the case of very small items, used low standard values, and in the case of more considerable property, applied tables of depreciation which reduced the awards materially from original costs to unrealistic values at the time of loss or damage.

(4) The language of the law authorizing replacement or restitution in kind was not implemented in practice, due to the impossibility of realization under post-war conditions. The qualification in the law permitting payment in cash, without even requiring the replacement of property with the funds awarded, simply recognizes the obvious. The additional condition imposed upon the Commission, that it shall require the whole of the payments to be invested in such manner as will further the rehabilitation or economic development of the Philippines, to be effective obviously would require such policing as the Commission had neither the time, the funds, nor the facilities to control.

(5) Payments under the word and spirit of the Act had to be made to innocent victims or to their heirs who might leave the Philippines, or conceivably never lived there.

(6) Despite the time record of the Commission, it still remains a fact that two to five years or more elapsed from the time of the loss or damage to the date of the award. Moreover, the payments above $500 made on larger claims were diminished in three ways: (a) the award, due to valuation procedures of the Commission, ordinarily reflected a great reduction from the claimed amount; (b) under the law an automatic reduction of 25 per cent of the excess over $500 was made; (c) initial proportionate payments on awards above $500 amounted to 30 per cent and it has been predicted by the Commission that about 50 per cent in all might be expected in final computation.

(7) Since the total physical damage to property in the Philippines has been estimated at from $800,000,000 to $1,250,000,000 (and by some at two billion dollars), the amount of money made available in the first place was inadequate to attack the job which the United States protested it would undertake.

(8) The functions and performance of the War Damage Commission were not integrated closely enough with other Philippine rehabilitation efforts. A number of assistance programs were going on at the same time. Years after the end of the war the Philippines are still in bad shape economically, and by standards of the United States, far from satisfactorily advanced physically.

2. *Public Claims*

Of the amount of 120 million dollars allowed by the Congress in Title III of the Act for the restoration and improvement of public property and essential public services in the Philippines, sixty-three million dollars was allocated to rehabilitation of public roads, public health, inter-island commerce, air navigation, and coast and geodetic surveys, each, as has been indicated earlier, under the administration of an agency of the United States within the jurisdiction of which such efforts would

ordinarily fall. Representatives of these arms of the United States Government have been located in the Philippines to complete work which is authentically rehabilitation.

The Philippine War Damage Commission was allowed 57 million dollars "to compensate the Republic of the Philippines, the provincial governments, chartered cities, municipalities and corporations wholly owned by the Commonwealth of the Philippines . . . for physical loss of or damage to public property in the Philippines" occuring within the same time limits, and as a result of the same perils of war, as designated for private property losses.[48]

The physical improvement of public property resulting from the direct efforts of agencies of the United States is obviously easier to detect than the recovery of the economy and even tangible incidents of private life. Roads were repaired, transportation services restored, under the very eyes of observers. Debris was swept from the harbor by the strong arms of men paid by the United States. Health services were revived to serve daily needs of the Filipino people. The War Damage Commission has appropriately placed upon principal Philippine schools and government buildings reconstructed with the aid of the United States plaques inscribed as follows: *"Rebuilt with the aid of the people of the United States of America under the Philippine Rehabilitation Act of 1946."*

Procedures in the rehabilitation of publicly owned property adopted and employed by the War Damage Commission from the beginning reflected three distinct basic policies. First: the Commission would not do the work itself; second: the Commission would not pay the entire sum of money awarded for the repair or reconstruction of a damaged or destroyed building directly to the Philippine Government to be spent by it; third: the Commission would pay to authorized agencies or subdivisions of the Philippine Government the money awarded to specific projects suggested by the Philippine Government, only as their progress and completion were verified by representatives of the Commission. Pursuant to these principles and practices, the Philippine Government presented to the War Damage Commission claims totalling approximately 190 million dollars. Priorities were adopted in making awards according to the following sequence: (1) hospitals and municipal water works; (2) schools; (3) government buildings. Again, despite the considerable expense to which the United States Government consented to go in its program of assistance, the amount of 120 million dollars (of which 57 million dollars was allocated to the War Damage Commission), was appreciably deficient. This is true even giving effect to the additional grant of surplus materials "to aid in repairing and replacing buildings . . . works, utilities, equipment or other property."[49]

The Philippine Government undertook and is completing restoration projects on a much larger scale, but it must be recognized that the contributions of the United States Government and the stimulation they furnished, particularly through the

[48] 60 STAT. 136, 50 U. S. C. App. §1784 (Supp. 1950).
[49] *Id.* §§1771-1776.

orderly processes, planning, and supervision afforded by representatives of the War Damage Commission, were of inestimable help, and probably account for some very substantial accomplishment not traceable to any other source.[50]

As early as destruction in the principal cities of the Philippines was viewed, it became apparent that the amount of money which the United States could or would donate towards physical rehabilitation would not be enough to accomplish the full job. Moreover, the pattern of distribution followed there may have been suited to the Philippines, but may never be applicable to another instance of the repair of war damage. The Philippine Government had become independent; it reserved the right to develop its own program of reconstruction, embracing improvements, changes of sites, and re-emphasis of projects according to overall plans of its own. Lastly, there is a question whether funds for rehabilitation should not have been turned over to the government suffering the damage to be expended by it without supervision or verification, a course which, for the Philippines, is not now open to review, but which may be considered in connection with future undertakings.

The writer has entertained little reservation in questioning the efficacy of the award of small welfare payments or even larger amounts in partial reimbursement for losses of private property, as a constructive factor in overall rehabilitation. He is ready to admit, however, that the dual program forced upon the War Damage Commission by the Act had the healthy effect of placing in comparable perspectives war damage money grants and public property rehabilitation. The implementation of the latter service, regardless of methods and amounts, appeared tangible, constructive, and durable. Improved planning and more advanced techniques of operation would serve to bring about an even better result.

III

CORRELATION OF WAR DAMAGE COMPENSATION AND REHABILITATION: CONCLUSIONS AND PROSPECTS

For the future which is now foreseeable there will be a measure of expedient application of the historical pattern in the settlement of war claims following lines

[50] Of the total amount of 57 million dollars allocated to the War Damage Commission for the program of restoration and repair of public property, $1,700,000 was set aside for estimated administrative expense. The balance determined by the Commission in conjunction with the Philippine Government was apportioned as follows:

Item	*Per cent of Allocation*	*Allocated Amount*	*Per cent of Estimated Loss*
Schools	62.4	$34,546,698.87	35.8
Hospitals and dispensaries	8.3	4,571,010.10	91.9
National government buildings	12.3	6,810,747.89	34.0
Provincial and Municipal government buildings	7.4	4,081,701.15	13.3
Waterworks and irrigation systems	5.6	3,089,841.99	59.5
Government corporations	4.0	2,200,000.00	17.9
	100.0	$55,300,000.00	

See SEVENTH SEMIANNUAL REPORT OF THE UNITED STATES-PHILIPPINE WAR DAMAGE COMMISSION, DECEMBER 31, 1949 22 (1950).

of (a) reparations from losing belligerents; (b) payment for property commandeered, confiscated or requisitioned under pressure of necessity; (c) indemnities and the adjustment of losses under treaties or other international agreements, whether on a national or territorial basis.

The concern with which the government of the United States has addressed itself to the ethical elements in war damages—justice and humanity—has not been diluted by considerations of material reward or reimbursement from other governments.[51] The big fact is there—that not much is to be hoped for in the way of indemnities or reparations for the very practical reason that none of the enemies of the Allies is solvent or likely to be for a long time. Still further, with the kind of war which is waged in the modern era, the enemy at the time of victory becomes reduced to a position where it is actually the charge of a victorious opponent, and in the name of humanity and sound business, if you please, demands its own rehabilitation at the expense of the rest of the world. It goes also without saying that despite encouraging signs of recovery among the Allies of the United States, it is too early to expect scientifically balanced international adjustments of war losses among them; the burden will ever fall on the most affluent.

A decline in international principles affecting requirements for the declaration of war, the rules governing the treatment of prisoners, and the adjustment of losses afterwards, has been brought about by each successive struggle through the process of violation by one side and retaliation by the other. Superficially, there have been accretions to the body of understanding and information in the subject of international law, and new techniques have been adopted governing restitution, reconstruction, and rehabilitation due, as an anomaly, to the corroding processes of war. In the Philippines, as has been pointed out, the United States, under no legal compulsion, and largely without precedent, made a contribution of sizable proportions to correct the dislocations brought about by warfare.

It is true that as far as the Philippine experience goes there have been demonstrated deficiencies in legislation and perhaps in administration in the earlier stages of the program. These resulted from (a) inexperience implicit in the novelty of the plan; (b) concerns of public relations which led to confusion between what were essential welfare payments to the little man and financial reimbursement to sufferers of more considerable property losses; (c) local peculiarities of language, custom, and geography.

The following considerations which the writer makes bold to express would not have sounded as trite a few years ago as they do now.

Only cooperative international action appears to be an effective instrument of progress towards peace. It is not just ethically correct, but economically sound,

[51] Conversely, in the case of the International Claims Settlement Act, the United States Government proposes to obtain settlement from countries which have nationalized private property or otherwise caused losses to nationals of our country before awards will be made to claimants for these losses. So far a settlement of $17,000,000 has been made with Yugoslavia; others are expected, although not immediate in time, with Poland and Czechoslovakia.

that those most fortunately situated in worldly goods should make their resources partly available to the backward and those denied equal gifts and opportunities. It is assumed that this principle will be supported only to the extent that it is consistent with a sane regard for conserving those resources upon which the prosperity of the favored nation is based.

The adjustment of losses after a war will have to take into account direct rehabilitation, irrespective of responsibility and beyond the limits of any plan which, like insurance, contemplates only monetary awards to individual sufferers. The kind of war damage compensation thus envisioned would be free from the detailed concerns incident to a program of war damage compensation which, in the case of the fraudulent, is unjustified, and in the case of real victims, often has been hopelessly inadequate. It does not provide, in the category of business and private property losses, for examination, investigations, appraisals, standard values, and other techniques, which are suitable to adjustment in avenues of commerce, but not in the field of international post-war recovery and reconstruction.

The future of war damage compensation might follow paths which at the moment may seem to be laid along very ambitious lines and in at least some directions may meet with obstacles of unpopularity and skepticism and fear. These paths in any event would have distinguishable and desirable characteristics, some of which may be suggested, even at the risk of approaching controversial territory.

First: The area of war losses having been identified, the nations participating in the hostilities resulting in such damage must immediately set up an agency to determine (a) the extent of the damage; (b) a formula for immediate relief and recovery on the basis of expediency;[52] (c) an overall plan for rehabilitation and improvement.

Second: The obligation to finance the rehabilitation program shall be independent of blame. Industry and government long ago discovered that in such socially significant areas as workmen's compensation (including occupational illness as well as accident), unemployment and old age security, specific causation or fault should be disregarded and benefits awarded as a part of the expense of doing business or conducting an organized society. Commercial and political entities underwrite restitution, relief, and rehabilitation, on a minimal basis, to be sure, as an incident to the vagaries of human existence. In international affairs, so long as warfare persists as an institution, and the kind of war is promised which is no respecter of noncombatant person or property, recovery and rehabilitation are also common, group responsibilities.

Third: The budget necessary to insure the completion of overall rehabilitation

[52] The writer was engaged in the efforts of the United States Government directly following the reoccupation of the Philippine Islands to bring immediate relief to war sufferers and to reestablish the channels of ordinary living and trade. These efforts, delegated officially first to the Foreign Economic Administration and then carried on in detail by the U. S. Commercial Company, a subdivision of this Administration later taken over by the Reconstruction Finance Corporation, were supplemented in the early post-war era by very effective private relief bodies. All of this was quite apart from the rehabilitation program covered by the Act of 1946.

will not depend upon the precise nature of the items lost, their cost, depreciation, replacement value, and other traditions in the school of claims adjustment. No isolated instance of fraud or exaggeration will be entertained as a distraction. The fractures of war will be reduced through rebuilding. Rehabilitation to be constructive must be along modern designs with a view to improvement rather than restoration of the *status quo ante bellum*. The nipa hut ought to have been replaced by livable dwelling quarters; the outhouse or tree-stump eventually has to give way to plumbing and a septic tank.

Fourth: Commencing on a physical level total reconstruction will entail as a normal consequence sound economic improvement extending into the life of each member of the community. Therefore, a loser of a hut or a carabao, although he may feel injured when denied restitution in kind or a cash equivalent, is actually a joint beneficiary with his fellow-men of the boons of modern planning—adequate housing facilities, up-to-date equipment, a generally enhanced economy with expanded opportunities for every individual.

Fifth: In the case of Korea, for instance, it is a remote hope that those whom we would adjudge malefactors will pay for the damage done during the invasion of the South and the battle for the North. Nonetheless, it is universally conceded that there must be (a) immediate relief measures, and (b) a total rehabilitation program to be adopted, implemented, and initiated as soon as possible. No one at this stage of world development is cynical enough to suggest that all we need do in this unhappy country is to pay, after meticulous investigation, the sums of money representing the depreciated value of property destroyed or damaged, or to undertake to restore it to its former condition which, except in the cases of a few buildings and installations, would mean a long step backwards.

Sixth: The United States is the repository of a considerable portion of the usable wealth of the world as well as of most of the remaining hopes of mankind. In connection with postwar restoration it already has assumed the heaviest burden, irrespective of fault or responsibility. The idea of doing most of the financing of wholesale rehabilitation in not only Korea but possibly Indonesia, Indo-China, Tibet, Persia, and other remote corners of the earth where the allied forces of freedom may be engaged by their challengers, may startle not only the conservative among our citizens but sound statesmen and international lawyers whose approaches have been conditioned to orthodox concepts of reparations, indemnities, and the payment of mixed claims in orderly procedures. If there were in existence an international fund, built up over the years, analogous to insurance deposits, against the casualty of war, resistance might not be great. The lack of such a fund, however, does not diminish the necessity or responsibility for the same kind of assistance as would be extended through insurance benefits. We have already adjusted ourselves to an agreeable reception of a law which permitted outright grants to the Philippines of more than half a billion dollars. Under the Marshall Plan and international defense agreements

we are committed to the expenditures of billions more without any hope of direct return, but with boundless confidence that we shall be rewarded by the betterment of the world of which we are a part. It is no great step in advance of what we are doing to subscribe unreservedly to the principle that rehabilitation of war damaged countries is a world responsibility which we shall share within the limits of our resources. It is not implied that the rehabilitation of any one country will be at the expense of the debilitation of another.

Seventh: The logical agency to plan, implement, and carry out a program of rehabilitation anywhere in the world is the United Nations.[53] If in the distant future there is to be an adjustment on the basis of blame or proportionate responsibility, it should be effected under the auspices of this convenient international mechanism. Any reserves which might be set up in peace times to cover the casualties of war should be assembled and safeguarded by a common instrumentality the strengthening of which by any means is a gesture towards peace. This is not the place to make specific recommendations, but the generalities propounded should be sufficiently imperative to set machinery in motion for fabricating workable plans.[54]

In the course of this discussion an effort has been made to correlate concepts of war damage compensation and total rehabilitation. Since the need for some form of adjustment of individual war claims along traditional lines will probably persist indefinitely, and since, moreover, a backdrop of historical activities may help a picture of the future, a general survey was first attempted.

The Philippine Rehabilitation Act of 1946 and the experience of the War Damage Commission were then presented for the object lessons they contain. It is true that in the case of the Philippines there were special pressures due to a long and unusual relationship. Many valid generalities, nevertheless, may be drawn from that experiment.

Hereafter, isolated domestic legislation donating money, property, and services should be avoided. Haphazard grants, gifts, and easy loans, made on the basis of politics, public relations, and even humanity, are essentially ineffectual in a genuine rehabilitation program. The combination of welfare payments or doles, relief

[53] UNESCO already has taken jurisdiction in relief and rehabilitation of war stricken areas.

[54] After this text had been prepared the naming of a civilian to rebuild Korea under United Nations auspices was recommended at Lake Success by a representative of the United States. The subject received widespread press notices among them the following which appeared in issues of October 17, 1950:

Washington Evening Star: "The United States proposed today that the United Nations appoint a supreme civilian boss to direct Korea's multi-million dollar economic rebuilding."

N. Y. Times: "No decisions have yet been taken on how the financial burden shall be borne. But the U. S.—because it is the only power that can spare substantial resources to do the job—will play a dominant part in the program. Last week President Truman said, 'The United States will carry its full share of this load.' "

The Christain Science Monitor: "President Truman, before leaving for his Wake Island meeting with Gen. Douglas MacArthur, approved a relief and rehabilitation program for Korea of nearly $1 billion, it was learned.

The program, as envisaged by the President, would call for establishment of a war damage and reconstruction corporation under United Nations auspices, to which the United States would contribute between $200,000,000 and $300,000,000 annually during the next three years."

measures, war damage settlements, and rehabilitation projects in one great hopper, is bound to lead to confusion and disappointing results.

What is indicated in the dangerous cases of war damage and destruction is a remedy, consistent with advances in world thinking, in the form of a systematic provision for total adjustment of total losses occasioned by total wars, governed wholly by the techniques of rehabilitation.

Collective compensation packaged in repair, reconstruction, and improvement of war devastated regions is an immediate objective which does not concern itself with individual indemnities for the loss of private possessions. The aggregate benefits of rehabilitation inure to the world and may be derived only from broad, progressive, and concerted action by all interested groups. Such action requires a common instrumentality which is now available in the United Nations Organization. This body, in the face of doubts and cynical assaults which have questioned its rights to survive, has successfully answered the call of war; given half a chance, it can do as well in response to the summons to compensate war damage through rehabilitation.

WAR CLAIMS: WHAT OF THE FUTURE?

QUINCY WRIGHT*

I

PRACTICE OF THE NINETEENTH CENTURY

During the nineteenth century war claims seemed to have been based on one or more of the following considerations: (1) respect for property and other legal rights of individuals, (2) respect for international law, (3) equalization of losses, (4) indemnity to the victor to recover war costs and to delay recovery of the enemy.

(1) *Respect for private rights.* Humanitarian sentiments toward non-combatants and civilians,[1] the economic interests of commercial and propertied classes,[2] and the prevalence of economic and political theories which emphasized the general interest in the maintenance of international trade, in separating economic activity from government, and in reducing the impact of war upon the community[3] greatly influenced the development of international law in the eighteenth and nineteenth centuries. That law came to protect private property from belligerent depredation, unless some specific military advantage was to be gained, and to protect enemy civilians in occupied territory, on the high seas, and in the belligerent's own territory from personal injury. Thus, it was normal for individuals who had had their property seized or their credits confiscated or who had suffered personal injury during war to demand restitution or compensation. Such claims might be made by the defeated as well as by the victor government and also by neutral governments in behalf of their nationals. Through the settlement of such claims international law developed

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[1] Grotius said: "It is the bidding of mercy, if not of justice, that except for reasons which are weighty and will effect the safety of many, no action should be attempted whereby innocent persons may be threatened with destruction," especially women and children, the religious, farmers, merchants and prisoners. DE JURE BELLI AC PACIS, Bk. III, c. xi, §§8-15 (1678).

[2] Franklin urged the exemption of farmers, fishermen, and merchants from the activities of war. 9 SPARKS, WORKS OF FRANKLIN 469 (1840); Hamilton opposed the confiscation of loyalist property during the Revolution (Camillus Letters); and John Marshall on the Supreme Court favored immunities of property in war. Brown v. United States, 8 Cranch 110 (U. S. 1814). See also U. S. NAVAL WAR COLLEGE, INTERNATIONAL LAW TOPICS AND DISCUSSIONS 9ff. (1905).

[3] Rousseau thought war was a relation among governments and armies, not among populations. This idea influenced French policy, especially in demanding exemption from capture of property at sea. Adam Smith's theory supporting freedom of economic activity from government influenced British policy and that of the world in general during the nineteenth century, especially in extending exemptions from war activity to international debts and property on land. Both theories were endorsed in the early history of the United States. Washington's *Farewell Address* (1796) advised "extending our commercial relations to have with them [European states] as little political connection as possible." See Rudolf Littauer, *Enemy Property in War*, in HANS SPEIER AND ALFRED KOHLER, WAR IN OUR TIME 277ff. (1939); Hans Speier, *Militarism in the Eighteenth Century*, 3 SOCIAL RESEARCH 304ff. (1936); QUINCY WRIGHT, A STUDY OF WAR 308ff. (1942).

definite rules setting the limits to the belligerent's confiscation, sequestration, or requisition of enemy or neutral property in his own or occupied territory or on the high seas.[4]

(2) *Respect for international law.* With the development of international law by treaty, custom, adjudication, and juristic discussion specific rules emerged defining the limits of belligerent action against enemy and neutral persons and property in occupied areas, on the high seas, and in the belligerent's own territory, and against the enemy's armed forces and civilians in the zone of combat. Rules also developed defining neutral duties of impartiality between belligerents, abstention from military assistance by the government, and prevention of hostile use of neutral territory. With this development governments might make post-war claims more to vindicate the law itself than to protect property or personal rights of their nationals, though the measure of such claims was usually the private losses resulting from illegal behavior, and reparation obtained by a government was normally distributed to the individuals who had been damaged.[5] Though such claims might most frequently be made by the victorious belligerent against his defeated enemy, in principle, as stated in the Hague Convention concerning rules of land warfare,[6] the defeated belligerent was equally entitled to make such claims.[7] Furthermore, as indicated by the *Alabama* case, a belligerent might make such claims against a delinquent neutral.[8]

(3) *Equalization of losses.* The injustice of casting an excessive burden of war upon a few individuals who had the misfortune to suffer property or other losses from enemy action tended to the assumption by governments of responsibility to compensate their nationals from such losses. Claim to such compensation was usually confined to combat damages which could not usually be insured against or to claims for separation allowances or pensions because of war services.[9] Losses resulting from belligerent seizures at sea were normally insured against, unless they took place early in the war before vessels had taken out war risk insurance. To cover such cases international law during the nineteenth century came to recognize "days of grace" upon the outbreak of war, during which belligerent seizure was illegal and would give rise to international claims for restitution or compensation if seizures actually occurred.[10] Claims arising from legitimate acts of war were based on municipal rather than international law and were usually confined to nationals or residents of the state which paid them, although among allies sometimes subsidies

[4] *Ibid.*

[5] Losses resulting directly or indirectly from legitimate operations of war gave no claim to compensation under international law though states frequently compensated their own nationals for such "combat damages." E. M. BORCHARD, DIPLOMATIC PROTECTION OF CITIZENS ABROAD 247, 256, 259, 279 (1919); 2 MARJORIE M. WHITEMAN, DAMAGES IN INTERNATIONAL LAW 1420 (1937).

[6] Art. 3.

[7] BORCHARD, *op. cit. supra* note 5, at 246ff.

[8] *Id.* at 277ff.

[9] *Id.* at 280.

[10] 6 HAGUE CONVENTION (1907); A. PEARSE HIGGINS, THE HAGUE PEACE CONFERENCES 300ff. (1909); G. G. WILSON, INTERNATIONAL LAW 331 (3d ed. 1939).

and assistance from the more fortunate would be given to equalize sacrifices or to relieve the distresses of the less fortunate.[11]

(4) *Indemnities.* The cost of compensating its nationals for combat damages as well as the general costs of the war has often induced the victor to demand indemnity from the defeated. Such demands have sometimes been based in principle upon a calculation of reparation for damages from illegal acts, but in practice they have usually gone much further and have included much of the public cost of the war including combat damage to individuals and indeed the cost of maintaining armies in the field. Often the theory that the defeated enemy had instituted the war by aggression and had prolonged it by undue resistance has been set forth as a moral justification. Sometimes indemnity demands have been designed less for compensation for acts in the past than for economic gain for the future through crippling of an economic rival. Sometimes the idea of preventing the defeated power from engaging in a war of revenge by reducing his economic capacity has been involved. But whether for reparation, indemnity, acquisition, or security, only the victor can collect such claims and frequently the economic incapacity of the defeated has imposed a limitation. Such claims have usually gone beyond any theory of justice and have been simply impositions of power with law entering in, if at all, as an unconvincing rationalization.[12]

II

PRACTICE OF THE WORLD WARS

Each of these bases for war claims has been affected by changes in military techniques, in social ideas, in international law, and in international organization during the last half century as manifested especially in the two world wars. Respect for property rights has been adversely affected by socialistic theories and practices and by the totalitarian character of war, which has made it difficult to separate private property and interests from the war effort of the enemy nation.[13] Claims to vindicate international law have been affected by the important changes in that law, especially the recognition of the distinction between the aggressor and the defender, and the recognition of the interests of the community of nations as a whole in the prevention of war and in the promotion of general prosperity and welfare.[14] The demand for equalization of losses was increased through the technical possibility of destroying enemy life and property on a large scale by aerial bombardment and the

[11] The theory of equalizing sacrifices among co-belligerents was one aspect of the lend lease and reciprocal lend lease policies instituted by the United States even before it entered World War II. E. R. STETTINIUS, JR., LEND LEASE 5 (1949); PRESIDENT'S FIFTH REPORT TO CONGRESS ON LEND LEASE 22 (June 22, 1942); Staley, *The Economic Implications of Lend Lease,* 33 AM. ECON. REV. 366ff. (1943). The United Nations Relief and Rehabilitation Administration after World War II and the United States Economic Cooperation Administration have had a similar equalizing purpose.

[12] COLEMAN PHILLIPSON, TERMINATION OF WAR AND TREATIES OF PEACE 269-277 (London, 1916); 2 L. OPPENHEIM, INTERNATIONAL LAW §269a (6th ed., Lauterpacht, London 1940); BERNARD M. BARUCH, THE MAKING OF THE REPARATION AND ECONOMIC SECTIONS OF THE TREATY 18ff. (1920).

[13] Q. WRIGHT, *op. cit. supra* note 3, at 307ff.

[14] *Id.* at 341ff., 891ff.

increased solidarity of defenders in alliance or international organization. This demand has tended to extend not only to the citizens of a single state, but to the coalition as a whole or the world community as a whole. Those nations bearing the brunt of loss because of geographical position or other cause tend to assert a moral claim to compensation from their more fortunate and wealthier allies.[15] The evolution of a higher ethical sense in the aspirations, if not always in the practice of nations, has made demands for indemnity for recovery of war costs or economic advantage more difficult to sustain. While such demands are still made the terminology of reparation for illegal acts, of measures to prevent future war, or of measures to reestablish world order has tended to be used. The Nazis and the Soviet government felt less need for such rationalization in World War II than did the Western Powers.[16]

As to World War I, by the Treaty of Versailles Germany and her Allies accepted responsibility "for causing all the loss and damage to which the Allied and Associated Governments and their nationals" were subjected by the war "imposed upon them by the aggressions of Germany and her Allies" (Art. 231) but, recognizing the inadequacy of Germany to make such vast reparations, actual obligations were to be determined by an inter-allied Reparations Commission which would judge Germany's capacity to pay and would be confined to compensation for damage to the civilian population during war by Germany's aggressions by land, sea, and from the air (Art. 232). In addition, private property rights and interests of Allied nationals in Germany would be restored or compensated and for this purpose the Allies could use the private property of Germans taken over by their alien property custodians during war (Art. 297), and Germany was to compensate her own nationals for their property thus utilized. Mixed arbitral tribunals were established between Germany and each of its allies to adjudicate claims brought by nationals of the Allied countries (Art. 304). The provisions of the other treaties ending World War I were similar.

The settlements of World War II, in so far as they have been made, have followed similar lines. The Yalta declaration "recognized it as just that Germany be obliged to make compensation" for the damage she had caused to the Allied nations "to the greatest extent possible" and the Potsdam declaration referred to this statement and added compensation "for the loss and suffering caused by Germany to the United Nations" and provided for specific removals of capital equipment from Germany for reparations. The Italian peace treaty provided lump sum reparations to the Soviet Union and other Eastern states without statement of reasons (Art. 74), permitted all the Allies to retain Italian property taken over by their custodians during the war, and required Italy to compensate her own nationals for their property thus taken (Art. 79), but prewar debts were not to be impaired (Art. 81). Italy

[15] BARUCH, *op. cit. supra* note 12.

[16] *Ibid.* See *Atlantic Charter* (1941); *Yalta Conference* (1945); *Potsdam Conference* (1945); *Potsdam Declaration Concerning Japan* (1945); *Statement by Edwin W. Pauley on German Reparations* (1945); *Post-Surrender Policy for Japan* (1945), *in* THE AXIS IN DEFEAT (U. S. Dep't State 1945), and MAKING THE PEACE TREATIES (U. S. Dep't State 1947).

was to restore identifiable property of Allied nationals taken by force on claim by their governments or, if destroyed, to substitute a similar article (Art. 75). Italy, on the other hand, renounced all war claims of its nationals and agreed to compensate them herself (Art. 76). In addition, the courts of the Allied governments, whose territory was occupied during the war, have in general given effect to the London Declaration signed by most of the United Nations on January 4, 1943 that they

> reserve all their rights to declare invalid any transfers of, or dealings with, property rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the governments with which they are at war or which belong or have belonged, to persons, including juridical persons, resident of such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

It is clear that the two world wars have resulted in two opposite tendencies in respect to war claims—the first, toward a more idealistic treatment of such claims in the interest of international justice and order and in recognition of the existence of a world community, and the second, toward a more vindictive treatment of the defeated states and peoples because of wide belief in their moral depravity, wide acceptance of their illegal aggression, and wide-spread hatred of them because of the tremendous losses and sufferings they were believed to have caused.[17]

A memorandum prepared by a Committee of the Council on Foreign Relations of New York was published in 1945. It stated: "The main objectives of any post-war settlement of property rights should be (1) justice under international law, (2) the establishment of conditions favorable to a durable peace, and (3) the expansion of international trade and investment."[18] Based on these principles nine specific recommendations were made. These permitted the Allies to sequestrate Axis private property in their territories, but required them eventually to restore it, unless held or used for the benefit of an Axis government or unless the Axis failed to restore the property of Allied nationals, and to compensate for damage and destruction due to use or negligence; to confiscate Axis public property except that protected by the law of war; to exercise all rights of war with respect to private property in occupied territory; and to declare invalid transfers of their own or their nationals' property effected by duress in Axis occupied territories. The Axis governments were to be obliged to restore Allied property, public and private, which they had taken over. Demand for reparation of war costs and combat damages of the Allies was considered a political and economic problem not to be confused with the legal duty to

[17] The wide and growing disparity between theory and practice is a cause of concern. It has in the past marked the decay of a civilization. See Q. WRIGHT, *op. cit. supra* note 3, at 160, 164, 353ff., 385ff.

[18] THE POST-WAR SETTLEMENT OF PROPERTY RIGHTS, A MEMORANDUM ON THE RESTITUTION OR INDEMNIFICATION OF PROPERTY SEIZED, DAMAGED OR DESTROYED DURING WORLD WAR II 1 (COUNCIL OF FOREIGN RELATIONS, NEW YORK, 1945). The Committee consisted of Edwin Borchard, Mitchell B. Carroll, John W. Davis, John Dickinson, Henry J. Friendly, Jerome S. Hess, Philip C. Jessup, Edward F. Johnson, Milton C. Lightner, Creswell M. Micou, Roland S. Morris, Wolcott H. Pitkin, Roland L. Redmond, Quincy Wright.

restore or compensate for private property interests protected by law. This report did not explicitly justify the discrimination between the treatment accorded to private property of nationals of the Allied states and those of the Axis states, but implied that the difference arose because the war had been initiated by Axis aggression, and this was specifically stated in a supplementary statement signed by three members of the Committee.[19] In general, this report manifested the "idealistic" tendency referred to, especially in protecting private rights of both sides in hostilities, and recognizing the legal distinctions between aggressor and defender governments, between genuinely private property and substantially public property, and between losses from government policy or act and from the exigencies of combat. Practice since the war has been based more on the "realistic" principle that "to the victor belongs the spoils." The interest of each victor state in augmenting its immediate wealth and power at the expense of either enemy or ally, and of revenge against not only criminal leaders, but also against enemy peoples has often overridden the human interest in restoration and compensation and the world interest in peace and prosperity.[20] After the American Civil War Lincoln's humane policy—"bind up the wounds"—was superceded by the bitter policy pronounced by Thaddeus Stevens—"the South is conquered soil." Such a change is difficult to avoid after hostilities have resulted in costly victory for one side and unconditional surrender for the other. It has not been avoided after World War II.[21]

[19] Messrs. Redmond, Micou, and Wright, *id.* at 62ff.

[20] The Western Powers and Russia have quarreled over the quantity and distribution of reparations to be taken from Germany (MAKING THE PEACE TREATIES (U. S. Dep't State 1947)) and the western allies have had difficulty in reaching agreement about the distribution of German reparations and external assets within their control. The agreement among eighteen countries signed at Paris on January 14, 1946 (TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES, No. 1655) was designed to eliminate direct and indirect German enemy interests and to prevent renewed development of German enemy influence as a threat to the national economic security of the participating countries; to protect direct and indirect non-enemy interests; and to promote effective administration seeking the greatest total realization of German enemy external assets. (Mason, *Conflicting Claims to German External Assets*, 38 GEO. L. J. 171, 199 (1950)). This agreement was supplemented by the Brussels agreement of December 5, 1947. 18 DEP'T STATE BULL. 3 (1948).

[21] This change in attitude is illustrated in comparing reports of the American Bar Association in 1943 and 1945. The first report declared: "Confiscation is contrary to the principles of law. It is contrary to our constitutional law principles, and to the principles of international law. When the reign of law for which we are fighting returns, parties injured by confiscations may be expected to seek just redress; and a just administration of law may be expected to award such redress. It has been so in the past; and if the basic traditional concepts of justice have meaning, it will be so again." *Report of the Special Committee on Custody and Management of Alien Property*, 68 A.B.A. REP. 450, 457 (1943). The report of 1945 repudiated this statement and concluded: "In an unbroken line of decisions the Supreme Court of the United States has held that the laws of war allow a belligerent to seize and confiscate the private property of enemy aliens, as spoil, without any compensation and without any application of the property to its claims or to those of its nationals against the enemy government; that there is no established rule of international law to the contrary; that it is one of the rights of war; that neither the Fifth Amendment nor any other provision of our constitution forbids it; and that it is a matter of grace whether the property shall be restored to the former alien owner. . . . It becomes, then, a mere question of national policy and fair treatment." The report then stated that "Our national policy has been and should be to refrain from confiscating, *as spoils of war*, the private property of enemy aliens, which is found within our borders on the outbreak of war." The report, however, recommended that: "Enemy property within the jurisdiction of the United States should be held and, if necessary, applied to secure the payment of all just claims of this war and any unpaid awards of the last war." Axis assets in enemy and

III

PRINCIPLES OF THE FUTURE

The present writer believes that in the future, law and policy in respect to war claims should have the objectives set forth in the United Nations Charter. These may be stated specifically as: (1) to discourage aggression, (2) to promote respect for human rights, (3) to promote respect for law and, (4) to promote general economic prosperity and welfare. To achieve these objectives the following principles, also expressed or implied by the Charter, should be observed.

(1) *Aggression should be prevented.* War in the sense of hostilities in which the parties are treated as legal equals is not likely to occur. Instead, the United Nations will generally be able to determine the aggressor and the principle of discrimination against the aggressor and its allies and in favor of the victim and the forces organized by the United Nations should be applied. This implies that the aggressor does not acquire new rights or relieve itself of duties by resort to hostilities. Consequently, the aggressor's legal liabilities in respect to "war claims" should be judged by the international law of peace. On the other hand, the victim and the states collaborating against aggression should enjoy all the rights which traditional international law has accorded to belligerents; consequently, the liabilities of these states in respect to "war claims" should be judged according to the rights of belligerents under the laws of war and neutrality.[22]

(2) *Human rights should be respected* irrespective of race, sex, language, or religion and should not be affected by the nationality or political convictions of the individual, unless he has been guilty of an offense or unless general public necessities intervene. This implies that an individual's property, contracts, or personal rights should not be subjected to special liability by virtue of the conduct of hostilities whether he is subject to an aggressor government or to a defender government unless he is a "war criminal" or unless required by the necessities of the defenders engaged in United Nations police action as measured by the standards of belligerent rights toward the enemy and neutrals.[23]

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neutral countries should be similarly applied on the basis of agreements giving consideration to allied and neutral interests. To carry out this policy "a non-political juridical tribunal" should be created by act of congress to adjudicate all claims of American nationals "arising out of acts of enemy governments." This procedure was in large measure unilateral and made no distinction between combat and non-combat claims. It would in effect differ little from a policy of confiscation of enemy property as spoils. The only amelioration in the interest of enemy individuals was the requirement that the Axis governments should compensate their nationals who had thus lost property and the statement: "Ultimately it is desirable to create a permanent adequate system of international courts for the adjudication of all international claims, with the new International Court of Justice as the Court of last resort, in order to build a consistent body of law and procedure relating to them." This committee of which Amos J. Peaslee was chairman, included Mitchell B. Carroll, Ralph M. Carson, Christopher B. Garnett, John Hanna, H. H. Martin, and William D. Mitchell. (AMERICAN BAR ASSOCIATION RECOMMENDATION FOR ADJUDICATION OF WAR CLAIMS ADOPTED DECEMBER 20, 1945, 28, 30, 35 (1945)).

[22] See note 14 *supra*. *Harvard Research in International Law, Draft Convention on Rights and Duties of States in Case of Aggression*, Arts. 2, 3, 6, 7, 33 AM. J. INT'L L. 827, 828 (Supp. 1939).

[23] U. N. CHARTER Arts. 55, 56; UNIVERSAL DECLARATION OF HUMAN RIGHTS Arts. 2, 17 (1948); H. LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 159 (London, 1950); *Harvard Research, Draft Convention on Aggression*, Art. 7, *supra* note 22, at 899.

(3) *Combat damages* whether resulting from action by the aggressor or by the defender forces should be compensated by national or international plans for recovery and should not be regarded as a basis for individual claims against any government. While the first principle stated above would justify making all combat damages a liability of the aggressor because of his initiation of the hostilities from which all of these damages have occurred, the size of such claims, the usual incapacity of the aggressor (after his presumed defeat) to pay, and the need of cooperation in reconstruction urge the assumption of responsibility by the United Nations to repair combat damages and to equalize losses in so far as individual nations have not dealt with such damages in their own territories.[24] The problem should be looked upon as one of reconstruction for the future rather than one of determining liability for past action. Observance of this principle, which tends to maximize the speed of recovery, has the additional advantage that it makes it unnecessary to attempt to determine who is responsible for combat damages, even in hostilities where the belligerents are treated as equal. Such damages refer to losses of life or property through sinking of vessels and bombardments and devastations in enemy or occupied territory under conditions of "military necessity." It is often difficult to tell which belligerent was responsible for a given loss of this kind. During an air raid, damage is caused by the fall-back of anti-aircraft guns as well as by enemy bombs. In the vicinity of battle or in an area of invasion it is often difficult to tell whose guns or mines were responsible for a given damage. It therefore seems desirable, whatever the legal character of the hostilities, that any effort to apportion responsibility be avoided and that the United Nations assume a political and moral responsibility for dealing with all such damages with an eye to reconstruction and equalization of burdens in so far as national governments do not themselves undertake such planning in their territories.

(4) *Non-combat damages* arising from acts of governments in confiscating, sequestrating, or requisitioning property; in imprisoning or injuring persons; or in permitting the deterioration or destruction of property in custody should be determined and compensation given in accordance with international law in the sense described in principle one above. Individuals would have claims against defender governments or against the United Nations only if the damage had occurred because of breach of the law of war. Condemnation of prizes taken at sea; confiscations, requisitions, and sequestrations of property in occupied territory; and assumption of custodianship of property of persons on the other side of the line of hostilities would give no claim to restitution or compensation if the action taken was in accord with the law of war. Doubtless, this law under the new principle distinguishing the aggressor and the defender imposes a general responsibility on all states not to protect their nationals who trade to the advantage of an aggressor government[25] and

[24] This has been the objective of UNRRA and ECA after World War II, extending even to Axis countries, and of the United Nations' General Assembly Resolution of October 7, 1950 in regard to Korea. 9 U. N. BULL. 449 (1950).

[25] U. N. CHARTER Art. 2, ¶ 5.

consequently the rights of capture and condemnation of prizes at sea might be greater than those permitted by the traditional law concerning neutral rights at sea.[26] In regard to property in occupied territory, the law of war is fairly well defined by the IV Hague Convention, 1907, and by numerous judicial decisions, particularly those of the mixed tribunals established after World War I.[27] Doubtless, detailed reconsideration of the applicability of those rules to hostilities against an aggressor is desirable.[28]

In regard to the custodianship of property in the territory of a belligerent state, the rule is not clear but it is believed that the rule which prevailed in the nineteenth century should be applied. Under this, property genuinely belonging to private persons on the other side of the line of war and not used for hostile purposes might be sequestrated for the period of the war, but should be restored after the war with compensation for deterioration or destruction through negligence. The more recent practice by which many belligerent states have taken this property and used it to compensate their own nationals for property seizures or other injuries by the enemy seems contrary to principles of human rights.[29] Innocent civilians, even if citizens of, or residents in, an aggressor nation, should not be made to pay for the delinquencies of the aggressor government.

Under this principle individuals would have claims against aggressor governments for any injury to property or persons contrary to the law of peace. No title could be acquired or transferred by action in pursuance of alleged "belligerent rights" because the aggressor does not enjoy such rights. Thus, property which may have been condemned as prize of war; may have been confiscated, requisitioned, or sequestrated in occupied territory; or may have been seized in the aggressor's own territory should be restored. International law has accepted the principle that confiscations or transfers by act of a sovereign state within its jurisdiction give a title good against the world, even if the act was in violation of law.[30] This does not apply, however, when the property is outside the state's jurisdiction.[31] All acts of an aggressor based upon alleged "belligerent" rights should be considered outside of the state's jurisdiction. Transfers which had been effected in occupied territory by coercion should be, therefore, regarded as invalid. The theory should be followed that such acts are *ultra vires* and cannot establish a title. Third parties, whether in the aggressor's territory or in other states, could not acquire legal title to property transferred by

[26] *Harvard Research, Draft Convention on Aggression*, Art. 7, *op. cit. supra* note 22, at 899.

[27] ERNST FEILCHENFELD, THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION 153 (1942).

[28] Downey, *Captured Enemy Property: Booty of War and Seized Enemy Property*, 44 AM. J. INT'L L. 488ff. (1950).

[29] See excellent discussion in III CHARLES CHENEY HYDE, INTERNATIONAL LAW 1726-1743 (2d. ed. 1945).

[30] Oddy v. Bovill, 2 East 473, 102 Eng. Rep. 450 (K. B. 1802); Luther v. Sagor, [1921] 3 K.B. 532 (C.A.).

[31] Rose v. Himeley, 4 Cranch 241 (U. S. 1808); Dalgleish v. Hodgson, 5 Mo. & P. 407 (C. P. 1831). The Steamship Appam, 243 U. S. 124 (1917).

such acts of the aggressor. If innocent, such third parties should have a claim against the aggressor government for compensation, but the original owner of the property should be able to claim restoration of the property.

It is clear that application of the last principle would give rise to considerable difficulty, especially if an aggressor government occupied an area for a long time, and if he condemned much property captured at sea. Many transactions might occur and many purchases for value might prove to have invalid titles. It may be urged that the principle of giving effect to acts of a *defacto* government should be applied in regard to private titles, giving the original owner not restoration but compensation from reparations demanded of the aggressor government. It is believed, however, that the principle of preventing the acquisition of new powers by the fact of aggression and the principle of respecting human rights, in addition to the commonly applied principle that illegal acts of a military occupant may be rescinded by the returning sovereign,[32] urge recognition of the *ultra vires* principle. That principle provides better protection for private rights, because the aggressor might not be able to pay reparations without seriously disturbing his economy. Furthermore, a clear rule warning individuals that they cannot acquire good title as a result of "belligerent" acts of an aggressor government or acts under its authority would interfere with the aggressor's activities more than would fear of reparations after the hostilities, in which he would doubtless hope to be victorious.

(5) *Individual claims should be determined judicially.* Claims of individuals against other individuals with respect to titles alleged to have been affected by unlawful "belligerent" action should be determined by tribunals of the state in which the transaction took place, but with appeal to international tribunals established by the United Nations for dealing with such cases. Claims of individuals whether against aggressor or defender governments should be dealt with in first instance by international tribunals constituted by the United Nations to insure impartiality. An opportunity might be provided to appeal on major questions of law to the International Court of Justice.

(6) *General reparations* should not be demanded against the aggressor (who would presumably be defeated). The only individual claims would be those arising from non-combat damages or transfers of property effected through illegal pressures of occupying forces. These would be dealt with in accord with principles four and five. Losses from combat damages should be dealt with by national or United Nations reconstruction plans. There should be no demands against the aggressor state, as such, for reparation, for indemnity, or for punishment. The plan developed by the United Nations should be based upon needs of economic reconstruction and world stability and doubtless, as has been true after World War II, this would frequently result in the economically most capable victims of aggres-

[32] This is the doctrine of *jus post liminii* and has been applied by Belgian courts in particular. FEILCHENFELD, *op. cit. supra* note 27, at 145ff.

sion contributing heavily not only to the less fortunate victims, but also to the aggressors themselves.[33] Imposition of disarmament requirements upon the aggressor nation should be judged solely from the point of view of international security and should not be made a reason for reparations in money or in kind.

The only punitive liability should be against individuals found by international tribunals to have been guilty of war crimes. It should be assumed that apart from war criminals the general population of the aggressor state were victims of the criminal action of the leadership of their government no less than were the population of the defender states. After hostilities, efforts should be directed to reconstruction and the promotion of human rights of all and any theory of criminal responsibility of the aggressor state as a whole should be rejected.[34]

As already indicated these principles were to a considerable extent accepted by the United Nations during World War II but in the circumstances it was inevitable that there should be some departures from them after the war.[35] The possibility of realizing these principles in the future will depend upon the development of the United Nations both in its procedures and in its popular support. Will it in time be able to assure that aggressors will never win, that the impartial tribunals called for will be established, and that an enlightened world public opinion will place world security, respect for human rights and international law, and increase of general welfare ahead of ideas of national victory, national power position, guilt claims" may be governed by principles of justice and welfare rather than by power by enemy association, and vindictiveness against the enemy? If it can, future "war to enforce demands for aggrandizement and revenge.

[33] See notes 11 and 24 *supra*.

[34] This was the theory of war crimes trials after World War II. See Wright, *International Law and Guilt by Association*, 43 AM. J. INT'L L. 746, 753 (1949).

[35] These principles were expressed or implied in certain pronouncements during the war such as the Atlantic Charter (1940), the Lend Lease Arguments (1941), the Declaration of United Nations (1942), the London Declaration on forced transfers (1943), the UNRRA Agreement (1943), and the Nuremberg Charter (1945), but these instruments did not always provide for impartial application of the principles. More vindictive policies toward the aggressor nations and peoples were suggested in the Casa Blanca (1943), Cairo (1944), Teheran (1944), Quebec (1944), Yalta (1945), and Potsdam (1945) declarations, and in practice general reparations demands were imposed on Axis states, economic burdens of practically punitive character were imposed on Axis populations, impartial tribunals were not established to deal with property restitution claims, and war crimes tribunals had jurisdiction only over Axis nationals.

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